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No. 12691

United States
Court of Appeals
for the Ninth Circuit.

ROYAL INDEMNITY COMPANY, a Corporation,
Appellant.

vs.

GEORGE N. OLMSTEAD,
Appellee.

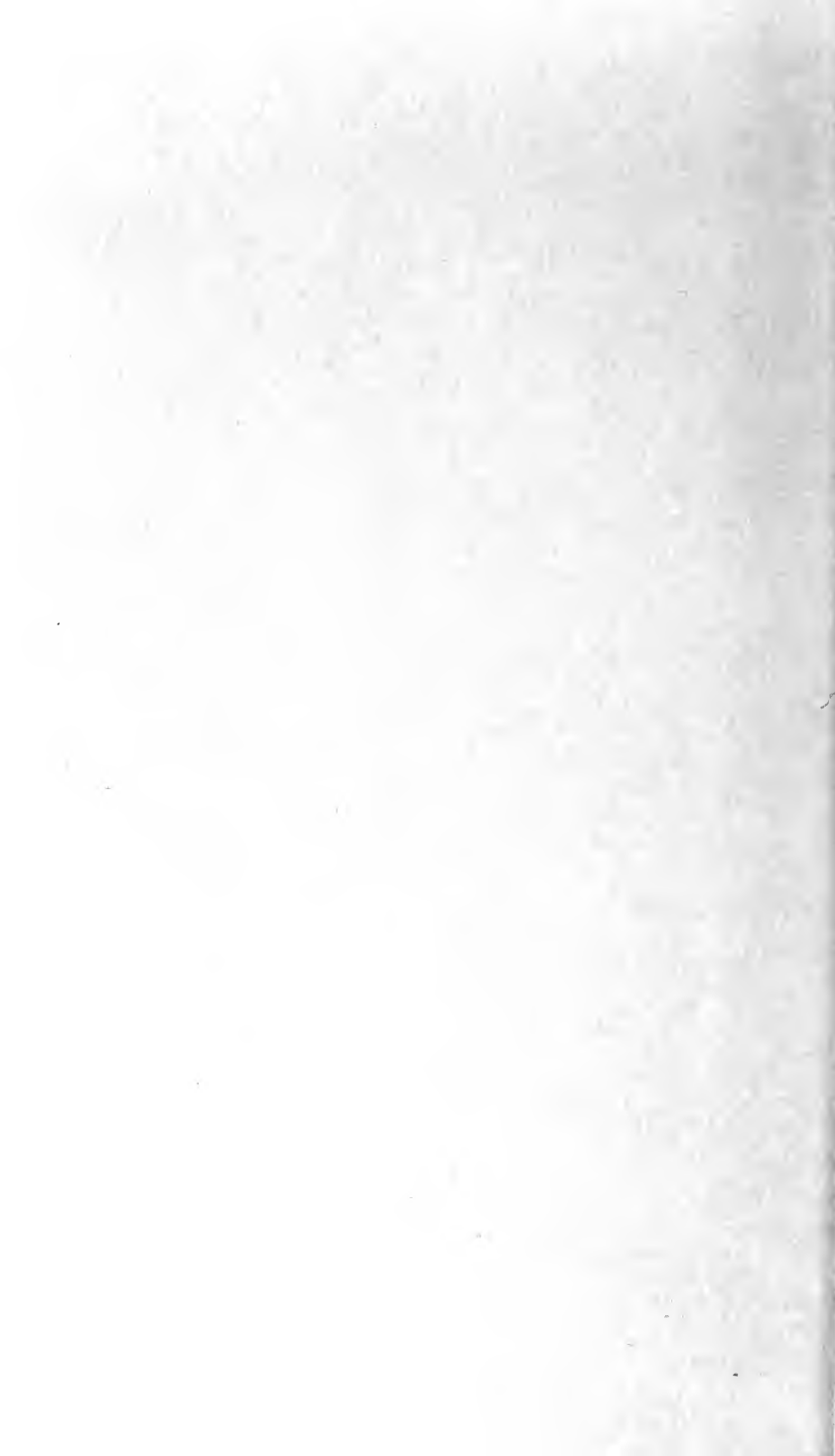
Transcript of Record

Appeal from the United States District Court,
Southern District of California,
Central Division

FILED

JAN 11 1951

PAUL P. O'BRIEN



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

TRIPP & CALLAWAY,
210 West Seventh St.,
Los Angeles 14, Calif.

For Appellee:

C. PAUL DuBOIS,
515 Van Nuys Bldg.,
210 West Seventh St.,
Los Angeles 14, Calif.

District Court of the United States, Southern
District of California, Central Division

No. 8729-OC

GEORGE N. OLMSTEAD,

Plaintiff,

vs.

ROYAL INDEMNITY COMPANY, a Corpora-
tion, et al.,

Defendants.

PETITION BY DEFENDANT CORPORATION
FOR REMOVAL TO FEDERAL COURT

To the Honorable, District Court of the United
States, Southern District of California, Central
Division:

The petition of the Royal Indemnity Company,
the defendant in the above-entitled action, respect-
fully shows:

1. That defendant Royal Indemnity Company is
a non-resident of the State of California and is a
corporation organized under the laws of the State
of New York.

2. That plaintiff was at the time of bringing said
suit, and still is, a resident and citizen of the State
of California.

3. That the matter and amount in dispute in said
suit exceeds, exclusive of interest and costs, the sum
of three thousand dollars (\$3,000.00).

4. That the said suit is of a civil nature, namely, an action for breach of contract and the controversy in this action is wholly between citizens of different states. [2*]

5. Your petitioner offers herewith a good and sufficient surety for its entering in the District Court of the United States, the Southern District of California, Central Division, within 30 days of the date of filing of this petition, a copy of the record of this suit, and for paying all costs that may be awarded by said District Court, if said court shall hold that this suit was wrongfully or improperly removed thereto.

Wherefore, your petitioner prays this honorable court to make an order of removal of this suit from the Superior Court of the State of California in and for the County of Los Angeles to said District Court, and to accept the said surety and bond, and to cause the records in said Superior Court to be removed into said District Court of the United States the Southern District of California, Central Division.

ROYAL INDEMNITY
COMPANY,

By /s/ M. J. RHEW,
Manager. [3]

State of California,
County of Los Angeles—ss.

M. J. Rhew being by me first duly sworn, deposes and says: that he is the manager of the Royal In-

*Page numbering appearing at foot of page of original Certified Transcript of Record.

demnity Company, a corporation, the above-named defendant in the foregoing and above-entitled action; that he has read the foregoing Petition and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true. That he is authorized to make this verification for and on behalf of said corporation.

/s/ M. J. RHEW.

Subscribed and sworn to before me this 5th day of October, 1948.

[Seal] /s/ ELIZABETH P. WILLIAMS,
Notary Public in and for the County of Los Angeles,
State of California.

Receipt of copy acknowledged.

[Endorsed]: Filed October 6, 1948. [4]

[Title of District Court and Cause.]

AMENDED COMPLAINT
MONEY DUE ON CONTRACT

Plaintiff complains of the defendants and for a cause of action alleges:

I.

That the defendants were, at all times herein referred to, and are corporations duly existing, qualified and doing business in the State of California,

and having and maintaining, at all times herein mentioned, offices in the County of Los Angeles, State of California.

II.

That defendants Doe Company, a corporation, and Roe Company, a corporation, were, at all times herein, and now are corporations, and are sued herein by fictitious names for the reason that plaintiff does not know said names; plaintiff prays leave to amend this complaint when the identities of said corporations are discovered.

That plaintiff is informed and believes and thereupon alleges [5] that defendants Doe Company, a corporation, or Roe Company, a corporation, were, at all times herein, and now are corporations engaged in the business of insuring against excess liability or of re-insurance. That said Doe Company or Roe Company had on and prior to April 9, 1946, a written contract with defendant Royal Indemnity Company, a corporation, or Roy R. Jordan as executor of the Estate of Harry E. Blodgett, deceased, or as testamentary trustee under the Last Will and Testament of Harry E. Blodgett, or with Harry E. Blodgett, an individual, doing business as Blodgett's Auto Service or Blodgett's Auto Service and Tours, to insure against excess liability from or to re-insure against claims or liabilities imposed by law for personal injuries or property damage resulting from accident occurring in the operation of the business known as Blodgett's Auto Service or Blodgett's Auto Service and Tours.

III.

That prior to April 9, 1946, Harry E. Blodgett did business in the County of Los Angeles, State of California, under the fictitious firm names of "Blodgett's Auto Service" or "Blodgett's Auto Service and Tours" in the renting for hire of passenger automobiles or drive-yourself passenger vehicles.

IV.

That on or about February 15, 1946, Harry E. Blodgett, died, and he was, at the time of his death, a resident of and left an estate in the County of Los Angeles, State of California.

V.

That shortly after February 15, 1946, Roy R. Jordan was duly appointed, qualified as and on April 9, 1946, was the executor of said Estate of Harry E. Blodgett, deceased, and was thereafter testamentary trustee under the Last Will and Testament of Harry E. Blodgett; and Roy R. Jordan was as of April 9, 1946, managing, conducting and operating the aforesaid car rental business referred to in Paragraphs III and IV hereinabove, which business was an asset of and owned by the said Estate and said business was being carried on by said Roy R. Jordan under order of the Superior Court of the State of California in and for the County of Los Angeles by its Probate Department. [6]

VI.

That at all times herein mentioned, the said Harry E. Blodgett or the Estate of Harry E. Blodgett, deceased, or Roy R. Jordan, as executor of said Estate or as testamentary trustee under the Last Will and Testament of said deceased, in conducting and operating said business known as Blodgett's Auto Service or Blodgett's Auto Service and Tours, conducted said business in the City of Pasadena, County of Los Angeles, State of California, and rented vehicles in said city with said vehicles to be used on the public streets of said City, County and State.

VII.

That said business was being operated within the provisions and under the terms of that certain ordinance of the City of Pasadena, a municipal corporation, a charter city, which said ordinance was known as Ordinance No. 3041, dated September 30, 1932, as amended, with said ordinance being entitled "An Ordinance of the City of Pasadena, Regulating the Operation of Certain Motor Propelled Vehicles, Drive-Yourself Vehicles, Vehicles Transporting Passengers for Compensation or for Sightseeing Purposes upon the Public Streets and Prescribing Penalties for the Violation thereof." That a written insurance contract, such as hereinafter referred to as Exhibit A, issued by Royal Indemnity Company and dated February 16, 1946, was required by said ordinance, and was applied for, because of and issued pursuant to, under and in accordance with

said ordinance, and said ordinance was, at all times mentioned herein, a part of the terms, covenants and agreements of said insurance contract. That said contract, Exhibit A, was caused to be filed with the City of Pasadena. That the said City issued a municipal permit under Section 2, a and 4, c of said ordinance to the said Blodgett or the said Blodgett's Auto Service or Blodgett's Auto Service and Tours or the said Estate or the said Jordan for the conducting of said business.

VIII.

That prior to April 9, 1946, on or about February 16, 1946, the Defendant Royal Indemnity Company had, for a valuable consideration, entered into said written insurance contract a "Comprehensive Liability Policy" dated [7] February 16, 1946, with Harry E. Blodgett, Harry E. Blodgett doing business as Blodgett's Auto Service and Tours, the Estate of Harry E. Blodgett, deceased, Roy R. Jordan as aforesaid executor of the said Estate or as testamentary trustee of said Estate; that a copy of said contract is annexed as Exhibit A and hereby is referred to and by this reference is incorporated at this point as though set out in full.

That a Packard automobile, hereinafter described, was and is scheduled in said insurance contract as a vehicle covered by the terms of said contract, and said vehicle was on April 9, 1946, an asset of and owned by Blodgett's Auto Service, Blodgett's Auto Service and Tours or the Estate of Harry E. Blodgett, deceased.

That said insurance contract provides that said Royal Indemnity Company guarantees payment to a judgment creditor for that part of said judgment which is within the amounts expressed in said policy, agrees to and would be liable for damage to property or the injury to any person, agrees with the insured to pay on behalf of the insured all sums which the insured shall become obligated to pay for damages because of bodily injury or injury to or destruction of property sustained by any person caused by accident, and would insure against liability from bodily injury or destruction of property or damage to property or for injury to any person or persons caused by and arising out of or resulting from negligence in the use, operation or ownership of the automobiles scheduled in said policy by any person operating said vehicle with permission of the owner. That said contract further provides that Harry E. Blodgett, Blodgett's Auto Service, Blodgett's Auto Service and Tours, the Estate of Harry E. Blodgett, deceased or Roy R. Jordan as said executor or trustee, or any other person sustaining negligent injury, or whose property is negligently damaged becomes a judgment creditor, is protected by said contract. Further said contract provides that said Royal Indemnity Company shall defend in the name and on behalf of any suit against the insured.

IX.

That prior to April 9, 1946, to wit on or about April 7, 1946, Harry E. Blodgett or Blodgett's Auto Service or Blodgett's Auto Service and [8] Tours or Roy R. Jordan as executor or trustee of said estate, had rented in the City of Pasadena, County of Los Angeles, State of California, for a consideration, a certain passenger carrying automobile which was a 1940 Packard vehicle, Motor No. C59614, California license No. 10L343, for purposes of using said vehicle as a passenger carrying automobile for an initial term expiring April 14, 1946, to Sam Richardson, also known as Sam G. Richardson, and said automobile was in his possession for said purpose with the consent of the said Harry E. Blodgett or Blodgett's Auto Service or Blodgett's Auto Service and Tours or Roy R. Jordan, as executor or trustee of said estate, on April 9, 1946.

X.

That Sam G. Richardson on April 9, 1946, drove, operated and used said Packard automobile with the permission and consent of Harry E. Blodgett or Blodgett's Auto Service or Blodgett's Auto Service and Tours or Roy R. Jordan as said executor or testamentary trustee.

XI.

That plaintiff, on April 9, 1946, in the County of Los Angeles, State of California, sustained bodily injuries and suffered property damages in a col-

lision accident at which time Sam Richardson, also known as Sam G. Richardson, negligently drove the aforesaid Packard automobile into and upon plaintiff; and plaintiff, thereafter by reason of said event, by and through his guardian ad litem, commenced and prosecuted an action for damages for personal injuries and property damage against the said Sam Richardson, also known as Sam G. Richardson, in the Superior Court of the State of California, in and for the County of Los Angeles, being Case No. 516890. That thereafter the court in said case signed Findings of Fact and Conclusions of Law, wherein the court found plaintiff had been damaged on account of said bodily personal injuries in the amount of \$25,000.00, and that plaintiff's estate and property was injured, wasted, destroyed, taken or carried away on account of expenses in the sum of \$4,357.00 and on account of loss of earnings in the sum of \$1,643.00. That plaintiff obtained judgment against said Sam G. Richardson on the 12th day of September, 1946, in the sum of \$31,000.00, [9] together with interest thereon at 7% per annum until paid, together with plaintiff's costs in the sum of \$14.00. That said judgment has become and is now final.

XII.

That the person referred to as Sam G. Richardson referred to in Paragraphs IX and X is the same and identical person as the person referred to as Sam G. Richardson referred to in Paragraph XI.

XIII.

That defendants had prior to June 27, 1946, notice of said collision accident and time, place and circumstances thereof, and that claims were made on behalf of, and that suit was filed by this plaintiff for damage sustained by reason of negligence on the part of Sam G. Richardson in operating said Packard vehicle rented from and operated with the consent of Harry E. Blodgett, or Blodgett's Auto Service or Blodgett's Rental Service, or Roy R. Jordan as said executor or trustee.

XIV.

That defendants at no time notified Sam G. Richardson that said contract of insurance insured him pursuant to the terms and conditions therein. That defendant Royal Indemnity Company or Blodgett's Auto Service for Royal Indemnity Company received a consideration for insuring said Sam G. Richardson and like persons under said contract of insurance.

XV.

That said judgment nor any part thereof has not been paid and remains wholly due and owing to plaintiff.

XVI.

That under and by virtue of the provisions of said insurance contract, Sam Richardson, also known as Sam G. Richardson, was an additional insured. That as of April 9, 1946, said contract among other things insured Sam G. Richardson and provided that said

insurer would pay judgments, costs taxed against the insured in a legal proceeding, together with interest accruing on judgments resulting from litigation until the payment thereof.

XVII.

That plaintiff is informed and believes and thereupon alleges [10] that all conditions and requirements of said insurance contract have been complied with, excepting the defendants or the said insurer, Royal Indemnity Company, making the payments due thereunder as demanded herein.

XVIII.

That hereinbefore plaintiff has caused to be made a demand upon said insurer for the payment of said judgment, together with interest and costs, which demand has been refused and the same is now wholly due and owing to plaintiff.

And for a further, Second and separate cause of action against the defendants, and each of them, plaintiff alleges as follows:

I.

Plaintiff refers to all of his first cause of action and incorporates the same herein, as though fully set forth at this point.

II.

That plaintiff is informed and believes and thereupon alleges that prior to April 9, 1946, defendants

had, for a valuable consideration, entered into a written insurance contract with Harry E. Blodgett, Blodgett's Auto Service, Blodgett's Auto Service and Tours, the estate of Harry E. Blodgett, deceased, Roy R. Jordan as aforesaid executor of the said estate or as testamentary trustee of said estate.

That said insurance contract or contracts provided that said defendant or defendants would insure Harry E. Blodgett, Blodgett's Auto Service, Blodgett's Auto Service and Tours, the estate of Harry E. Blodgett, deceased, and Roy R. Jordan as said executor or trustee, and any other person against loss by reason of liability imposed by law upon each or any of them for damages because of bodily injury or destruction of property sustained by any person or persons, caused by and arising out of the use of the automobiles as scheduled in said policy. That a Packard automobile, herein described, was scheduled in said insurance contract as a vehicle covered by the terms of said contract, and on April 9, 1946, was an asset of and owned by Blodgett's Auto Service, Blodgett's Auto Service and Tours, and the estate of Harry E. Blodgett, deceased. [11]

III.

That said contract or contracts were on April 9, 1946, in full force and effect.

Wherefore, plaintiff prays judgment for the sum of \$31,014.00, together with interest thereon at the rate of 7% per annum from the 12th day of September, 1946, until paid, and for plaintiff's costs

incurred herein, and such other and further relief as may seem just and equitable in the premises.

/s/ C. PAUL DuBOIS,
Attorney for Plaintiff.

State of California,
County of Los Angeles—ss.

George N. Olmstead, being by me first duly sworn, deposes and says: That he is the plaintiff in the above-entitled action; that he has read the foregoing Amended Complaint—Money Due on Contract and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon information or belief, and as to those matters that he believes it to be true.

/s/ GEORGE N. OLMSTEAD.

Subscribed and sworn to before me this 19th day of September, 1949.

[Seal] /s/ JOHN E. SISSON,
Notary Public in and for
Said County and State. [12]

Exhibit A

Comprehensive Liability Policy
Combination Automobile and General Liability
Form (Pacific Coast)

Royal Indemnity Company

Head Office: New York 8, N. Y. 150 William Street

J. F. O'Loughlin, President

Duplicate Original Policy

CRX 100219

Issued to: Blodgett's Auto Service & Tours.

Expiration: February 16, 1947.

Total Premium: \$2503.96.

Please Read Your Policy

Every accident, however slight, should be reported immediately to the agent or company.

ROY JORDAN, INC.

Insurance in all its Branches, 740 E. Colorado St.,

Pasadena (1), Calif., SY 6-5348, RY 1-6491.

Comprehensive Liability Policy

Combination Automobile and General Liability
Form (Pacific Coast)

Royal Indemnity Company

Head Office New York A New York Corporation

Royal Indemnity Company

Declarations

Item 1

Name of Insured: H. E. Blodgett, D.B.A. Blodgett's
Auto Service & Tours.

Address: Green Hotel, Corner of Green and Raymond Streets, Pasadena, Los Angeles County, California.

Business of the Named Insured is: Private Livery,
Public Livery, U-Drive.

Named Insured is (Individual, Corporation or Partnership): Individual.

Item 2

Policy Period: From February 16, 1946, to February 16, 1947, 12:01 a.m., standard time at the address of the named insured as stated herein.

Item 3

The insurance afforded is only with respect to such and so many of the following coverages as are indicated by specific premium charge or charges. The limit of the Company's liability against each such coverage shall be as stated herein, subject to all of the terms of this policy having reference thereto. [13]

Coverages	Limits of Liability			Advance Premiums
	Each Person	Each Accident	Aggregate Products	
A—Bodily Injury Liability.....	\$15,000.00	\$30,000.00	Not Covered	\$2,120.67
B—Property Damage Liability—Automobile.....	Each Accident \$ 5,000.00	* * * *	* * * *	383.29
C—Property Damage Liability—Except Automobile.....	Each Accident \$.....	Aggregate Operations \$.....	Aggregate Protective \$.....	(none)
Endorsements attached to policy at issuance.	Aggregate Products \$.....	Aggregate Contractual \$.....	* * * *	
Total Advance Premium.....				\$2,503.96

If Policy Period is more than one year premium is payable: On effective date of Policy \$.
 1st Anniversary \$. 2nd Anniversary \$.

Item 4

During the past year no insurance has canceled any similar insurance issued to the named insured, except as herein stated:

No Exceptions

Countersigned at Los Angeles, California.

C. H. THOMPSON,

By HARRIETT C. WATTERS,

Authorized Representative.

Page One

Royal Indemnity Company

(A stock insurance company, herein called the company)

Agrees With the Insured, named in the declarations made a part hereof, in consideration of the payment of the premium and in reliance upon the statements in the declarations and subject to the limits of liability, exclusions, conditions and other terms of this policy:

Insuring Agreements

I.

Coverage A—Bodily Injury Liability

To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason

of the liability imposed upon him by law, or assumed by him under contract as defined herein, for damages, including damages for care and loss of services, because of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person or persons and caused by accident.

Coverage B—Property Damage Liability—

Automobile

To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law for damages because of injury to or destruction of property, including the loss of use thereof, caused by accident and arising [14] out of the ownership, maintenance or use of any automobile.

Coverage C—Property Damage Liability—

Except Automobile

To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law, or assumed by him under contract as defined herein, for damages because of the injury to or destruction of property, including the loss of use thereof, caused by accident.

II.

Defense, Settlement, Supplementary Payments

As respects such insurance as is afforded by the other terms of this policy the company shall

(a) defend in his name and behalf any suit against the insured alleging such injury, sickness, disease or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; but the company shall have the right to make such investigation, negotiation and settlement of any claim or suit as may be deemed expedient by the company;

(b) pay all premiums on bonds to release attachments for an amount not in excess of the applicable limit of liability of this policy, all premiums on appeal bonds required in any such defended suit, but without any obligation to apply for or furnish such bonds, all costs taxed against the insured in any such suit, all expenses incurred by the company, all interest accruing after entry of judgment until the company has paid, tendered or deposited in court such part of such judgment as does not exceed the limit of the company's liability thereon, and expenses incurred by the insured, in the event of bodily injury, sickness or disease, for such immediate medical and surgical relief to others as shall be imperative at the time of accident;

(c) pay the cost of bonds, but without obligation to apply for or furnish such bonds, guaranteeing the insured's appearance in court if such appearance is required by reason of an accident or traffic law violation occurring during the policy period and arising out of the use of an automobile with respect to which use insurance is afforded such insured under coverage A of this policy. The company's liability under this insuring agreement with

respect to each bond shall not exceed the usual charges of surety companies for such bond nor \$100;

(d) reimburse the insured for all reasonable expenses, other than loss of earnings, incurred at the company's request.

The company agrees to pay the amounts incurred under this insuring agreement, except settlements of claims and suits, in addition to the applicable limit of liability of this policy.

III.

Definition of "Insured"

The unqualified word "insured" includes the named insured and also includes (1) under coverages A and C, any partner, executive officer, director or stockholder thereof while acting within the scope of his duties as such, except with respect to the ownership, maintenance or use of automobiles while away from premises owned, rented or controlled by the named insured or the ways immediately adjoining, and (2) under coverages A and B, any person while using an owned automobile or a hired automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is with the permission of the named insured, and any executive officer of the named insured with respect to the use of a non-owned automobile in the business of the named insured. The insurance with respect to any person or organization other than the named insured does not apply under division (2) of this insuring agreement: [15]

(a) To injury to or sickness, disease or death of any person who is a named insured;

(b) with respect to an automobile while used with any trailer not covered by like insurance in the company; or with respect to a trailer while used with any automobile not covered by like insurance in the company;

(c) to any person or organization, or to any agent or employee thereof, operating an automobile repair shop, public garage, sales agency, service station or public parking place, with respect to any accident arising out of the operation thereof;

(d) to any employee with respect to injury to or sickness, disease or death of another employee of the same employer injured in the course of such employment in an accident arising out of the maintenance or use of an automobile in the business of such employer;

(e) with respect to any hired automobile, to the owner thereof or any employee of such owner;

(f) with respect to any non-owned automobile, to any executive officer if such automobile is owned in full or in part by him or a member of his household.

IV.

Policy Period, Territory

This policy applies only to accidents which occur during the policy period within the United States of America, its territories or possessions, Canada or Newfoundland. With respect to automobiles this policy also applies to accidents which occur during

the policy period while the automobile is being transported between ports thereof.

Exclusions

This policy does not apply:

(a) to liability assumed by the insured under any contract or agreement not defined herein;

(b) under coverages A and C, except with respect to operations performed by independent contractors, to the ownership, maintenance or use, including loading or unloading, of (1) watercraft while away from premises owned, rented or controlled by the named insured, or (2) aircraft;

(c) under Coverage A, except with respect to liability assumed under contract covered by this policy to bodily injury to or sickness, disease or death of any employee of the insured while engaged in the employment of the insured, other than a domestic employee whose injury arises out of the maintenance or use of an automobile covered by this policy while such employee is not engaged in the operation, maintenance or repair thereof, or to any obligation for which the insured or any company as his insurer may be held liable under any workmen's compensation law;

(d) under coverage B, to injury to or destruction of property owned by, rented to, in charge of or transported by the insured;

(e) under coverage C, except with respect to operations performed by independent contractors, to the ownership, maintenance or [16] use of auto-

mobiles while away from premises owned, rented or controlled by the named insured or the ways immediately adjoining;

(f) under coverage C, to injury to or destruction of (1) property owned, occupied or used by or rented to the insured, or (2) except with respect to liability assumed under sidetrack agreements and the use of elevators or escalators, property in the care, custody or control of the insured, or (3) any goods or products manufactured, sold, handled or distributed or premises alienated by the named insured, or work completed by or for the named insured, out of which the accident arises;

(g) under coverage C, except with respect to liability assumed under contract covered by this policy and except in so far as this exclusion is stated in the policy to be inapplicable, to (1) the discharge, leakage or overflow of water or steam from plumbing, heating, refrigerating or air-conditioning systems, elevator tanks or cylinders, standpipes for fire hose, or industrial or domestic appliances, or any substance from automatic sprinkler systems, (2) the collapse or fall of tanks or the component parts or supports thereof which form a part of automatic sprinkler systems, or (3) rain or snow admitted directly to the building interior through defective roofs, leaders or spouting, or open or defective doors, windows, skylights, transoms or ventilators, in so far as any of these occur on or from premises owned or rented by the named insured and injure or destroy buildings or contents thereof.

Conditions

The conditions, except conditions 4, 5, 6 and 8, apply to all coverages. Conditions 4, 5, 6 and 8 apply only to the coverage or coverages noted thereunder.

1. Premium

The premium stated in the declarations is an estimated premium only. Upon termination of this policy, the earned premium shall be computed in accordance with the company's rules, rates, rating plans, premiums and minimum premiums applicable to this insurance. If the earned premium thus computed exceeds the estimated advance premium paid, the named insured shall pay the excess to the company; if less, the company shall return to the named insured the unearned portion paid by such insurer. When used as a premium basis:

(1) the word "remuneration" shall mean the entire remuneration earned during the policy period by all employees of the named insured, other than drivers of teams or automobiles subject with respect to each executive officer to a maximum and a minimum remuneration of \$100 and \$30 per week, and the remuneration of each proprietor at a fixed amount of \$2,000 per annum;

(2) the word "receipts" shall mean the gross amount of money, including taxes, charged by the named insured for such operations by the named insured or by others during the policy period as are rated on a receipts basis;

(3) the word "cost" shall mean the total cost of all operations performed for the named insured during the policy period by independent contractors in each separate project, including materials used or delivered for use, except maintenance or ordinary alterations and repairs of premises owned or rented by the named insured; [7]

(4) the word "sales" shall mean the gross amount of money, including taxes, charged for all goods and products sold or distributed during the policy period by the named insured or by others trading under his name;

(5) the words "cost of hire" shall mean the amount incurred for hired automobiles, including remuneration of the named insured's chauffeurs employed in the operation of such automobiles;

(6) the words "Class 1 persons" shall mean the following persons, provided their usual duties in the business of the named insured include the use of non-owned automobiles: (a) all employees, including officers, of the named insured compensated for the use of such automobiles by salary, commission, terms of employment, or specific operating allowance of any sort; (b) all direct agents and representatives of the named insured;

(7) the words "Class 2 employees" shall mean all employees, including officers, of the named insured, not included in Class 1 persons.

The named insured shall maintain for each hazard records of the information necessary for premium computation.

2. Inspection and Audit

The company shall be permitted to inspect the insured premises, operations, automobiles and elevators and to examine and audit the insured's books and records at any time during the policy period and any extension thereof and within one year after the final termination of this policy, as far as they relate to the premium bases or the subject matter of this insurance.

Attach Riders Here

Comprehensive General Liability (Pacific Coast)

Overtime Remuneration Endorsement

It is agreed that the earned premium shall be computed in accordance with the Premium Condition of the policy and the following additional provisions:

1. If the named insured's books are maintained so as to show separately, by employee and by classes of work,

(a) the remuneration earned at regular rates of pay for total hours worked, and

(b) extra remuneration earned for overtime

the remuneration upon which premium for the policy is based shall include all remuneration specified in subdivision (a) foregoing and shall not include any of the remuneration specified in subdivision (b) foregoing.

2. If the named insured's books are maintained so as to show separately, by employee and by classes of work,

(a) the remuneration earned at regular rates of pay for those hours worked when there is no overtime, and

(b) the remuneration earned at regular rates of pay and for overtime for those hours worked when there is overtime [18] the remuneration upon which the premium for the policy is based shall include all remuneration specified in subdivision (a) and two-thirds of the remuneration specified in subdivision (b) foregoing.

3. "Overtime" means those hours worked when there is an increase in rate of pay because of holidays, Saturdays, Sundays, the number of days worked in any one week, or the number of hours worked in any one day.

4. This endorsement is not applicable to remuneration earned for stevedoring operations.

Attached to and hereby made a part of Policy No. CRX-100219 issued by the Company to Blodgett's Auto Service & Tours.

F. S. PERRYMAN,
Secretary.

Countersigned:

C. H. THOMPSON,
By HARRIETT C. WATTERS,
Authorized Representative.

Comprehensive General Liability
(Pacific Coast)

Exclusion of Products Hazard

It is agreed that the policy does not apply:

1. to the products hazard as defined in the policy,
2. to a warranty of goods or products within the policy definition of the word "contract" if the accident occurs after the insured has relinquished possession thereof to others and
 - (a) away from premises owned, rented or controlled by the insured, or
 - (b) on such premises for which the classification stated below or in the company's manual excludes any part of such products hazard.

Classification:

Attached to and hereby made a part of Policy No. CRX-100219 issued by the Company to Blodgett's Auto Service & Tours.

F. S. PERRYMAN,
Secretary.

Countersigned:

C. H. THOMPSON,
By HARRIETT C. WATTERS,
Authorized Representative.

CL20660-5M-10-45 Ed. 7-45 Printed in U.S.A.

Add'l. Prem.

Endorsement No. 296060

Return Prem.

Important: Please attach to Policy Contract.

In consideration of the premium for which this policy is [19] written, it is hereby understood and agreed that coverage is also provided for personal, pleasure, family and business use.

This endorsement shall take effect at 12:01 A. M. February 16, 1946.

Nothing herein contained shall be held to waive, alter, vary or extend any of the terms or provisions of this Policy, except as herein stated, nor shall this endorsement bind the Company until countersigned by a duly authorized representative of the Company.

Attached to and hereby made a part of Policy No. CRX-100219 issued to Blodgett's Auto Service & Tours.

ROYAL INDEMNITY
COMPANY,
J. F. O'LOUGHLIN,
President.

Countersigned:

C. H. THOMPSON,
By HARRIETT C. WATTERS,
Authorized Representative.

R20029 80M Sets 8-44 Printed in U.S.A.

Public Automobiles—Earnings Basis

(Owned or Hired Automobiles)

It is understood and agreed that such insurance as is afforded by the policy for Bodily Injury Liability and for Property Damage Liability applies with respect to all owned automobiles and hired

automobiles used for the purposes stated as applicable thereto in the schedule forming a part hereof, subject to the following provisions:

1. Definitions. "Owned automobile" shall mean an automobile owned in full or in part by the named insured. "Hired automobile" shall mean an automobile used under contract in behalf of the named insured provided such automobile is not owned in full or in part by or registered in the name of (a) the named insured or (b) an executive officer thereof or (c) an employee or agent of the named insured who is granted an operating allowance of any sort for the use of such automobile.

2. Application of Insurance. The insurance does not apply to the owner of any hired automobile or any employee of such owner.

Schedule

The insurance afforded is only with respect to such and so many of the following coverages as are indicated by specific premium charge or charges.

Premium Basis—Gross Earnings

Purposes of Use	Estimated Annual Gross Earnings	Rate per \$100 of Gross Earnings		Advance Premiums	
		Coverage A	Coverage B	Coverage A	Coverage B
1. Private Livery	Varies	\$4.25	\$.68	\$797.00	\$164.50
2. U-Drive Driverless Car	\$1500.00	8.37	1.4	1255.50	210.00
		Total Advance Premiums (Included in Policy \$ Premium)			

Trade Name	Seating Cap.	Year	Serial No.	Engine No.
1. Buick	Sedan	1940	13681232	53866333
2. Cadillac	Sedan	1940	3111642	3111642
3. Packard	Sedan	1941	D35521C	424607
4. Packard	Sedan	1940	138240008	59614
5. Buick	Sedan	1942	44620834	24312825
6. Mercury	Coupe	1940		99-A241627
7. Chevrolet	Sedan	1941	2AH1113199	AA187881
8. Chevrolet	Sedan	1941	AA118064	6AH106812
9. Packard	Sedan	1940	1372-3272	C503580
10. Chevrolet	Sedan	1941	6AG0215316	AA504023
11. Packard	Sedan	1942	1592-5303	E305360
12. Packard	Sedan	1941	D11922	DE1484-2186
13. Chevrolet	Sedan	1941	5AH-10-8846	AA153798
14. Buick	Sedan	1940	23605373	53831748
15. Packard	Sedan	1939	1272-3485	B-504272
16. Chevrolet	Sedan	1941	1AH-06-47061	AA954816
17. Plymouth	Sedan	1942	11430139	P14-426459
18. Chevrolet	Sedan	1940	21KA-06-40019	3534460

The other provisions of this endorsement are printed on the back of this sheet and are a part of this endorsement.

Attached to and hereby made a part of Policy No. CRX-100219 issued to Blodgett's Auto Service & Tours.

C. H. THOMPSON.

Countersigned:

By HARRIETT C. WATTERS,
Authorized Representative.

3. Premium. The named insured shall pay to the company at the effective date of the policy the advance premium stated in the schedule. On or before the twentieth day of each month, the named insured shall render to the company a statement showing the total gross earnings of all licensed automobiles covered by the policy during the preceding calendar month, and the premium applicable to such total gross earnings shall be payable to the company at once. Upon termination of the policy, the earned premium for such automobiles shall be computed by the application of the earnings rates stated in the schedule to the amount of total gross earnings during the policy period of all such automobiles, but such premium shall not be less than the minimum premium herein provided. If the earned premium thus computed exceeds the premium paid for such automobiles, the named insured shall pay the excess to the company; if less, the company shall return to the named insured the unearned portion paid by such insured.

The minimum premium for owned automobiles shall be 75% of the total of the individual specified car premiums for the classification designated in the schedule, stated in the Automobile Casualty Manual in use by the company on the effective date of the policy, including 75% of the pro rata of such annual premium for each automobile owned for a shorter time than the total policy period. The minimum premium for hired automobiles shall be as stated in the schedule.

4. Records. The named insured shall maintain for the policy [21] period the following chronological record with respect to each such automobile:

A. Owned Automobiles.

- (1) place of principal garaging;
- (2) the year of model, trade name, model, body type (seating capacity, if bus), serial number, motor number, and purpose of use;
- (3) the date of acquisition of each such automobile acquired by the named insured during the policy period;
- (4) the date of sale or disposition of each such automobile sold or disposed of by the named insured during the policy period.

B. Hired Automobiles.

- (1) place of principal use by the named insured;
- (2) number and type;
- (3) periods of use by the named insured;
- (4) the names of the owners or lessees of such automobiles.

C. The total gross earnings during the policy period for all such automobiles.

The named insured shall send copies of such records to the company at the end of the policy period and at such times during the policy period as the company may direct.

5. Inspection and Audit. The company shall be permitted to inspect such automobiles and to examine and audit the insured's books and records at any time during the policy period and any extension thereof and within one year after the final termination of the policy, as far as they relate to the premium basis or the subject matter of this insurance.

6. Declarations. The named insured declares that the policy contains a complete list of all such automobiles owned, leased or hired by him at the effective date of the policy.

Nothing herein contained shall be held to waive, alter, vary or extend any of the terms or provisions of this policy, except as herein stated, nor shall this endorsement bind the company until countersigned by a duly authorized representative of the company.

In witness whereof the Royal Indemnity Company has caused this endorsement to be signed by its president and countersigned on the other side of this sheet by a duly authorized representative.

ROYAL INDEMNITY
COMPANY,
J. F. O'LOUGHLIN,
President.

Add'l. Prem.

Endorsement No. 60253

Return Prem.

Important: Please attach to Policy Contract.

It is hereby understood and agreed that notwithstanding expressions inconsistent with or contrary thereto, in this policy or any endorsement thereto contained, this policy is specifically issued to cover passenger-carrying automobiles rented or leased [22] in the City of Pasadena, or which the owner uses or allows or permits to be used as drive-ur-self vehicles on the streets of the City of Pasadena.

Wherever the term "Assured" or "Insured" is used in the bodily injury liability coverage and in other parts of this policy when applicable to such coverage, it shall include the driver of any vehicle insured hereunder when driving said vehicle with the consent, express or implied, of the named "Assured" or "Insured"; and in the event that a final judgment for any loss or claim under this policy is rendered against the owner and/or driver of such automobile, the Insurer guarantees payment direct to the plaintiff, securing such judgment of that part of said judgment which is within the limits expressed in the policy, irrespective of the financial responsibility of the assured, and for the purpose of enforcing this guarantee, an action may be commenced and maintained against the insurer by any such plaintiff.

It is hereby understood and agreed that the insurance policy to which this endorsement is attached will not be cancelled by the insurer or at the request

of the insured until the City of Pasadena, care of City Manager, City Hall, Pasadena, California, shall have notice in writing at least ten (10) days immediately prior to the time when such cancellation shall become effective.

This endorsement shall take effect at 12:01 A. M. February 16, 1946.

Nothing herein contained shall be held to waive, alter, vary or extend any of the terms or provisions of this Policy, except as herein stated, nor shall this endorsement bind the Company until countersigned by a duly authorized representative of the Company.

Attached to and hereby made a part of Policy No. CRX-100219 issued to Blodgett's Auto Service & Tours.

ROYAL INDEMNITY
COMPANY,
J. F. O'LOUGHLIN,
President.

Countersigned:

C. H. THOMPSON,
By HARRIETT C. WATTERS,
Authorized Representative,
Royal Indemnity Company.

R20030 20M Sets 2-45 Printed in U.S.A.

Add'l. Prem.

Endorsement No. 60256

Return Prem.

Important: Please attach to Policy Contract.

In consideration of the premium charged, the Policy to which this endorsement forms a part is

hereby extended subject to its terms and conditions to cover the operation of private passenger automobiles owned by the insured and driven by persons other than the named insured or his employees in a U-Drive Rental Service.

The premiums for this extended coverage shall be based on the gross earnings for such U-Drive driverless car operations and shall be computed at the rates given below per \$100.00 of such earnings. "The U-Drive Driverless Car Earnings" shall be the total amount charged by the insured, whether collected or not. Upon termination of this policy the amount of such earnings shall be exhibited to the company and the earned premiums computed at the rates and under the terms of this endorsement. If the earned premiums thus computed is greater than the advance premiums paid, the insured shall pay the additional amount to the company; if less, the company shall return to the insured the unearned portion but, except in the event of cancellation [23] the company shall retain the minimum premiums set forth in this endorsement.

The minimum premiums for the coverage provided by this endorsement and for the coverage provided under Division 2 "U-Drive Driverless Car" combined shall be Ninety-Five and 18/100 Dollars (\$95.18-P.L.) and Eighteen and 75/100 Dollars (\$18.75-P.D.) on the annual basis for each automobile owned by the insured for use in such operations. It is warranted by the insured that a total of Eighteen (18) automobiles are owned and so used at the inception date of this policy. The

insured agrees to maintain a complete and accurate record of all such automobiles for the purpose of determining the minimum premiums at the end of the policy period.

The following schedule contains statements and declarations made by the named insured and sets forth the rates applicable to the coverage provided by this Endorsement.

Estimated Total Remuneration

\$15000.00

Rates Per \$100.00

\$9.30-P.L.

\$1.50-P.D.

This endorsement shall take effect at 12:01 A. M. February 16, 1946.

Nothing herein contained shall be held to waive, alter, vary or extend any of the terms or provisions of this Policy, except as herein stated, nor shall this endorsement bind the Company until countersigned by a duly authorized representative of the Company.

Attached to and hereby made a part of Policy No. CRX-100219 issued to Blodgett's Auto Service & Tours.

ROYAL INDEMNITY
COMPANY,
J. F. O'LAUGHLIN,
President.

Countersigned:

C. H. THOMPSON,

By

Authorized Representative.

R20030 20M Sets 2-45 Printed in U.S.A.

Comprehensive Personal Liability Endorsement
Exclusion of Residence Employees

It is agreed that the policy does not apply with respect to injury to or sickness, disease or death of any residence employee of an insured while engaged in the employment of said insured.

This endorsement shall take effect on February 16, 1946, at 12:01 A. M., standard time.

Nothing herein contained shall be held to waive, alter, vary or extend any of the terms or provisions of this Policy, except as herein stated, nor shall this endorsement bind the Company until countersigned by a duly authorized representative of the Company.

Attached to and hereby made a part of Policy No. CRX-100219 issued by the Company to Blodgett's Auto Service & Tours.

F. S. PERRYMAN,
Secretary.

Countersigned:

C. H. THOMPSON,
By HARRIETT C. WATTERS,
Authorized Representative.

CL71 10M 6-44 Ed. 6-44 Printed in U.S.A. [24]

Comprehensive Liability Endorsement
Individual as Named Insured

(Application of Policy to Non-Business Pursuits
of the Named Insured and Family)

This Endorsement Does Not Apply to Automobile Coverages.

1. It is agreed that the policy applies to non-business and non-occupational pursuits of the insured, subject to the following provisions:

Insuring Agreements

1. Insuring Agreement I is amended to read:
Coverage A—Liability

(Bodily Injury, Property Damage
and Employers')

To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law, or the liability of others assumed by him under written contract relating to the premises, for damages, including damages for care and loss of services, because of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person or persons, and for damages because of injury to or destruction of property, including the loss of use thereof.

Coverage B—Medical Payments (Premises and Employees)

To pay to or for each person who sustains bodily injury, sickness or disease, caused by an accident, while on the premises with the permission of an insured, or while elsewhere (1) if the accident arises out of the premises or a condition in the ways immediately adjoining or is caused by an animal

owned by an insured, or (2) if the injury is sustained by a residence employee while engaged in the employment of the insured, the reasonable expense of necessary medical, surgical, ambulance, hospital and professional nursing services and, in the event of death resulting from such injury, sickness or disease, the reasonable funeral expense, all incurred within one year from the date of accident.

2. Insuring Agreement II applies only to Coverage A.

3. Insuring Agreement III is amended to read:
Definition of "Insured"

The unqualified word "insured" includes the named insured and also includes, if residents of his household, his spouse and relatives of either and, with respect to any animal owned by an insured, any person or organization legally responsible therefore. The insurance with respect to any insured, other than the named insured or spouse, does not apply under coverage A to injury to or death of any employee of said insured while engaged in his employment, unless assisting him in his personal sports activities.

4. Insuring Agreements IV is amended to read:
Policy, Period, Accidents

This policy applies only to accidents during the policy period. [25]

Exclusions

The exclusions are amended to read:

(a) to any act or omission in connection with

other premises owned, rented or controlled by an insured; or to the rendering of any professional service or the omission thereof;

(b) to the ownership, maintenance or use, including loading and unloading, of (1) motor vehicles, trailers or semi-trailers while away from the premises or the ways immediately adjoining, (2) watercraft, other than canoes or rowboats, exceeding twenty-one feet in over-all length or inboard motor boats, owned by or rented to an insured, while away from the premises, or (3) aircraft; but, with respect to injury sustained by a residence employee while engaged in the employment of the insured, parts (1) and (2) of this exclusion do not apply, and part (3) applies only while such employee is engaged in the operation or maintenance of aircraft;

(c) under coverage A, to any obligation for which the insured or any company as his insurer may be held liable under any workmen's compensation law;

(d) under coverage A, to injury to or destruction of (1) property used by, rented to or in the care, custody or control of the insured, or (2) premises alienated by an insured out of which the accident arises;

(e) under Coverage B, to bodily injury to or sickness, disease or death of (1) any person to or for whom benefits therefor are payable under any workmen's compensation law; (2) any insured; or (3) any person, other than a residence employee, if such person is regularly residing on the premises, or is on the premises because of a business con-

ducted thereon or is injured by an accident arising out of such business.

Conditions

1. Conditions captioned "Notice of Accident," "Changes," "Assignment," "Cancelation," and "Declarations" apply to coverages A and B. Conditions captioned "Notice of Claim or Suit," "Assistance and Cooperation of the Insured," "Action Against Company," "Other Insurance" and "Subrogation" apply only to coverage A. No other condition of the policy applies to either coverage A or B.

2. Definitions

(a) Premises.

The unqualified word "premises" means (1) all premises where the named insured or his spouse maintains a residence and includes garages and stables incidental thereto and individual or family cemetery plots or burial vaults, except business property and farms, and (2) premises in which an insured is temporarily residing, if not owned by an insured, and vacant land owned by or rented to an insured, other than farm land.

"Business property" includes (1) property on which a business, other than that specifically declared in this endorsement, is conducted, and (2) property rented in whole or in part to others, or held for such rental, by the insured

other than (a) the insured's residence if rented occasionally or if a two-family dwelling usually occupied in part by the insured or (b) such [26] garages or stables, if not more than three car spaces or stalls are so rented or held.

(b) Residence Employee.

"Residence employee" means an employee of the named insured or his spouse whose duties are incidental to the ownership, maintenance or use of the premises, including the maintenance or use of automobiles or teams, or who performs duties of a similar nature not in connection with the insured's business.

The other provisions of this endorsement are printed on the back of this sheet and are a part of this endorsement.

(c) Accident:

"Accident" wherever used in connection with coverage A includes a continuous or repeated exposure to conditions, which results in injury during the policy period, provided the injury is accidentally caused. All damages arising out of such exposure to substantially the same general conditions shall be considered as arising out of one accident.

(d) Assault and Battery.

Assault and battery shall be deemed an accident unless committed by or at the direction of the insured.

3. Limits of Liability

The limit of liability stated in this endorsement for coverage A is the limit of the company's liability for all damages arising out of any one accident.

The limit of liability stated in this endorsement for coverage B is the limit of the company's liability for all expenses incurred by or on behalf of each person who sustains bodily injury, sickness or disease, including death resulting therefrom, in any one accident.

The inclusion herein of more than one insured shall not operate to increase the limits of the company's liability.

4. Medical and Other Reports; Examination—Coverage B

The injured person or someone on his behalf shall, as soon as practicable after each request from the company, furnish reasonably obtainable information pertaining to the accident and injury, and execute authorization to enable the company to obtain medical reports and copies of records. The injured person shall submit to physical examination by physicians selected by the company when and as often as the company may reasonably require.

5. Proof and Payment of Claim—Coverage B

As soon as practicable after completion of the services or after the rendering of services which in cost equal or exceed the limit of liability for medical payments or after the expiration of one year from the date of the accident, whichever is the

first, the injured person or someone on his behalf shall give to the company written [27] proof of claim under oath, stating the name and address of each person and organization which has rendered services, the nature and extent and the dates of rendition of such services, the itemized charges therefore and the amounts paid thereon. Upon the company's request, the injured person or someone on his behalf shall cause to be given to the company by each such person and organization written proof of claim under oath, stating the nature and extent and dates of rendition of such services, the itemized charges therefor and the payments received thereon.

The company shall have the right to make payment at any time to the injured person or to any such person or organization on account of the services rendered, and a payment so made shall reduce to the extent thereof the amount payable hereunder to or for such injured person on account of such injury. Payment hereunder shall not constitute admission of liability of the insured or, except hereunder, of the company.

6. Action Against Company—Coverage B

No action shall lie against the company unless, as a condition precedent thereto, there shall have been full compliance with all the terms of this insurance, nor until thirty days after the required proofs of claim have been filed with the company.

Schedule

The named insured declares that:

1. The principal residence premises designated below are the only premises where the named insured or spouse maintains a residence, other than business property and farms, except as herein stated: No Exceptions.

2. The named insured or spouse is not conducting any business or occupational pursuits at the premises, except as herein stated: No Exceptions.

3. The number of residence employees of named insured or spouse is: None full time: If Any part time. The hours per week worked by each part time employee are Less Than $1\frac{1}{2}$ Full Time.

4. The principal residence premises are located at 606 Meridian Avenue, South Pasadena, California.

Limits of Liability

Coverage A \$15,000.00 each accident. Coverage B \$250.00 each person (Medical Payments).

2. It is further agreed that the policy does not apply: (1) to any business or occupational pursuits of an insured, except in connection with the conduct of a business of which the named insured is the sole owner; or (2) to the rendering of any professional service or the omission thereof.

This endorsement shall take effect at 12:01 A.M. (time of day), February 16, 1946 (date).

Nothing herein contained shall be held to waive, alter, vary or extend any of the terms or provisions

of this Policy, except as herein stated, nor shall this endorsement bind the Company until countersigned by a duly authorized representative of the Company.

Attached to and hereby made a part of [28] Policy No. CRX-100219 issued to Blodgett's Auto Service & Tours.

ROYAL INDEMNITY
COMPANY

Countersigned:

C. H. THOMPSON,
By HARRIETT C. WATTERS,
Authorized Representative.

R20473 4M 12-44 Ed. 6-44 Printed in U.S.A.

3. Definitions (a) Contract. The word "contract" shall mean a warranty of goods or products or, if in writing, a lease of premises, easement agreement, agreement required by municipal ordinance, sidetrack agreement, or elevator or escalator maintenance agreement.

(b) Automobiles. The word "automobile" shall mean a land motor vehicle, trailer or semitrailer, provided the following described equipment shall not be deemed an automobile except while towed by or carried on a motor vehicle not so described: any crawler-type tractor, farm implement, farm tractor or trailer not subject to motor vehicle registration, ditch or trench digger, power crane or shovel, grader, scraper, roller, well drilling machinery, asphalt spreader, concrete mixer and mixing and finishing equipment for highway work,

other than a concrete mixer of the mix-in-transit type. The word "trailer" shall include semitrailer. Use of an automobile includes the loading and unloading thereof.

"Owned automobile" shall mean an automobile owned in full or in part by the named insured.

"Hired automobile" shall mean an automobile used under contract in behalf of the named insured provided such automobile is not owned in full or in part by or registered in the name of (a) the named insured or (b) an executive officer thereof or (c) an employee or agent of the named insured who is granted an operating allowance of any sort for the use of such automobile.

"Non-owned automobile" shall mean any other automobile.

The terms of this policy shall apply separately to each automobile insured hereunder but a motor vehicle and a trailer or trailers attached thereto shall be held to be one automobile as respects limits of liability.

(c) Products Hazard. The term "products hazard" shall mean

(1) The handling or use of, the existence of any condition in or a warranty of goods or products manufactured, sold, handled or distributed by the named insured, other than equipment rented to or located for use of others but not sold, if the accident occurs after the insured has relinquished possession thereof to others and away from premises owned, rented or controlled by the insured or on premises

for which the classification stated in the company's manual excludes any part of the foregoing;

(2) operation, if the accident occurs after such operations have been completed or abandoned at the place of occurrence thereof and away from premises owned, rented or controlled by the insured, except (a) pick-up and delivery, (b) the existence of tools, uninstalled equipment and abandoned or unused materials and (c) operations for which the classification stated in the company's manual specifically includes completed operations; [29] provided operations shall not be deemed incomplete because improperly or defectively performed or because further operations may be required pursuant to a service or maintenance agreement.

(d) Assault and Battery. Assault and battery shall be deemed an accident unless committed by or at the direction of the insured.

4. Limits of Liability—Coverage A

The limit of bodily injury liability stated in the declarations as applicable to "each person" is the limit of the company's liability for all damages, including damages for care and loss of services, arising out of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by one person in any one accident; the limit of such liability stated in the declarations as applicable to "each accident" is, subject to the above provision respecting each person, the total

limit of the company's liability for all damages, including damages for care and loss of services, arising out of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by two or more persons in any one accident.

5. Limits of Liability—Products Coverages A and C

The limits of bodily injury liability and property damage liability stated in the declarations as "aggregate products" are respectively the total limits of the company's liability for all damages arising out of the products hazard. All such damages arising out of one prepared or acquired lot of goods or products shall be considered as arising out of one accident.

6. Limits of Liability—Coverage C

The limit of property damage liability stated in the declarations as "aggregate operations" is the total limit of the company's liability for all damages arising out of injury to or destruction of property, including the loss of use thereof, caused by the ownership, maintenance or use of premises or operations rated upon a remuneration premium basis or by contractors' equipment rated on a receipts premium basis.

The limit of property damage liability stated in the declarations as "aggregate protective" is the total limit of the company's liability for all damages arising out of injury to or destruction of property, including the loss of use thereof, caused by opera-

tions performed for the named insured by independent contractors or omissions or supervisory acts of the insured in connection therewith, except maintenance or ordinary alterations and repairs on premises owned or rented by the named insured.

The limit of property damage liability stated in the declarations as "aggregate contractual" is the total limit of the company's liability for all damages arising out of injury to or destruction of property, including the loss of use thereof, with respect to each contract.

These limits apply separately to each project with respect to operations being performed away from premises owned or rented by the named insured.

7. Limits of Liability

The inclusion herein of more than one insured shall not operate to increase the limits of the company's liability. [30]

8. Financial Responsibility Laws—Coverages A and B

Such insurance as is afforded by this policy for bodily injury liability or property damage liability shall comply with the provisions of the motor vehicle financial responsibility law of any state or province which shall be applicable with respect to any such liability arising out of the ownership, maintenance or use during the policy period of any automobile insured hereunder, to the extent of the coverage and limits of liability required by such law, but in no event in excess of the limits of lia-

bility stated in this policy. The insured agrees to reimburse the company for any payment made by the company which it would not have been obligated to make under the terms of this policy except for the agreement contained in this paragraph.

9. Notice of Accident

When an accident occurs written notice shall be given by or on behalf of the insured to the company or any of its authorized agents as soon as practicable. Such notice shall contain particulars sufficient to identify the insured and also reasonably obtainable information respecting the time, place and circumstances of the accident, the names and addresses of the injured and of available witnesses.

10. Notice of Claim or Suit

If claim is made or suit is brought against the insured, the insured shall immediately forward to the company every demand, notice, summons or other process received by him or his representative.

11. Assistance and Cooperation of the Insured

The insured shall cooperate with the company and, upon the company's request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits. The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical and surgical relief to others as shall be imperative at the time of accident.

12. Action Against Company

No action shall lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company.

Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this policy to the extent of the insurance afforded by this policy. Nothing contained in this policy shall give any person or organization any right to join the company as a co-defendant in any action against the insured to determine the insured's liability.

Bankruptcy or insolvency of the insured or of the insured's estate shall not relieve the company of any of its obligations hereunder.

13. Other Insurance

If the insured has other insurance against a loss covered by this policy the company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the declarations bears to the total applicable limit of liability of all valid and collectible insurance against such loss; provided, [31] however, the insurance under this policy with respect to loss arising out of the use of any non-owned automobile shall

be excess insurance over any other valid and collectible insurance available to the insured, either as an insured under a policy applicable with respect to such automobile or otherwise.

14. Subrogation

In the event of any payment under this policy, the company shall be subrogated to all the insured's rights of recovery therefor against any person or organization and the insured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The insured shall do nothing after loss to prejudice such rights.

15. Changes

Notice to any agent or knowledge possessed by any agent or by any other person shall not effect a waiver or a change in any part of this policy or estop the company from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed, except by endorsement issued to form a part of this policy, signed by the President, a Vice-President, or a Secretary of the company and countersigned by an authorized representative of the company.

16. Assignment

Assignment of interest under this policy shall not bind the company until its consent is endorsed hereon; if, however, the named insured shall die or be adjudged bankrupt or insolvent within the policy period, this policy unless canceled, shall if written notice be given to the company within sixty

days after the date of such death or adjudication, cover (1) the named insured's legal representative as the named insured, and (2) subject otherwise to the provisions of Insuring Agreement III, any person having proper temporary custody of any owned automobile or hired automobile, as an insured, until the appointment and qualification of such legal representative but in no event for a period of more than sixty days after the date of such death or adjudication.

17. Cancellation

This policy may be canceled by the named insured by mailing to the company written notice stating when thereafter such cancellation shall be effective. This policy may be canceled by the company by mailing to the named insured at the address shown in this policy written notice stating when not less than five days thereafter such cancellation shall be effective. The mailing of notice as aforesaid shall be sufficient proof of notice and the effective date and hour of cancellation stated in the notice shall become the end of the policy period. Delivery of such written notice either by the named insured or by the company shall be equivalent to mailing.

If the named insured cancels, earned premium shall be computed in accordance with the customary short rate table and procedure. If the company cancels, earned premium shall be computed pro rata. Premium adjustment may be made at the time cancellation is effected and, if not then made, shall be made as soon as practicable after cancela-

tion becomes effective. The company's check or the check of its representative mailed or delivered as aforesaid shall be a sufficient tender of any refund of premium due to the named insured.

18. Declarations

By acceptance of this policy the named insured agrees that the statements in the declarations are his agreements and representations, that this policy is issued [32] in reliance upon the truth of such representations and that this policy embodies all agreements existing between himself and the company or any of its agents relating to this insurance.

In Witness Whereof, the Royal Indemnity Company has caused this policy to be signed by its president and secretary at New York, N. Y., and countersigned on the declarations page by a duly authorized representative of the company.

J. F. O'LOUGHLIN,
President.

JAS. B. CLANCY,
Secretary.

No. 18416

INCREASED LIMITS OF LIABILITY

Important: Please Attach to Policy Contract
To Be Determined

In consideration of an Additional Premium of \$ By Audit, the limits of liability as expressed in Item 3 of the declarations of this policy are amended to read as follows:—

Coverages	Limits of Liability	
A. Bodily Injury Liability	\$ 50,000.00	Each Person
	\$100,000.00	Each Accident
B. Property Damage Liability	\$ 10,000.00	Each Accident

Approved as to Form:

H. BURTON NOBLE,
City Attorney.

By ROYAL M. SORENSON,
Deputy City Attorney.

Dated Aug. 27, 1946.

This endorsement shall take effect on July 17th, 1946, at 12:01 a.m. standard time.

Nothing herein contained shall be held to waive, alter, vary or extend any of the terms or provisions of this Policy, except herein stated, nor shall this endorsement bind the Company until countersigned by a duly authorized representative of the Company.

Attached to and hereby made a part of Policy No. CRX-100219 issued to Roy Jordan, et al.

ROYAL INDEMNITY
COMPANY,
J. F. O'LOUGHLIN,
President.

Countersigned:

C. H. THOMPSON,
By EDNA BANNA,
Authorized Representative.

R20207A 3M Sets 4-45 Rev. 4-45 Printed in U.S.A.

Receipt of copy acknowledged.

[Endorsed]: Filed January 3, 1950. [33]

[Title of District Court and Cause.]

ANSWER TO AMENDED COMPLAINT

Comes Now the defendant, Royal Indemnity Company, a corporation, and for answer to the amended complaint on file herein admits, denies and alleges:

First Cause of Action

I.

Answering paragraph II this defendant denies generally and specifically each, every and all of the allegations contained in the second sub-paragraph thereof.

II.

Answering paragraph VIII this defendant denies generally and specifically each, every and all of the allegations contained in the third and last sub-paragraph thereof.

III.

Answering paragraph IX defendant has no information or belief sufficient to enable it to answer the allegation that [35] said automobile was in the possession of Sam G. Richardson on April 9, 1946, and basing its denial on that ground, denies said allegation.

IV.

Denies generally and specifically each and every allegation contained in paragraph X.

V.

Answering paragraph XI defendant has no in-

formation or belief sufficient to enable it to answer the allegation that Sam G. Richardson drove the Packard automobile, or any other vehicle, into and upon plaintiff, as alleged in plaintiff's amended complaint and basing its denial on that ground, denies said allegation; further answering said paragraph, defendant admits that plaintiff prosecuted an action against Sam G. Richardson in Superior Court case number 516890 but in this connection defendant alleges that the said Sam G. Richardson did not notify defendant or the named assureds that he had ever been served with summons and complaint in said action; further, that defendant is informed and believes and thereupon alleges that the said Sam G. Richardson did not appear in court prior to the entry of his default or at the hearing of said action for the assessment of damages and that no testimony was introduced on behalf of the said Sam G. Richardson and that judgment was entered in said action against him by default.

VI.

Defendant has no information or belief upon which to answer the allegations contained in paragraphs XII and XV and upon that ground denies every allegation therein contained.

VII.

Answering paragraph XIII this defendant admits that prior to the alleged date it had notice of the purported collision accident and the claims and alleged suit of the plaintiff; further answering the

said paragraph denies each, every and all of [36] the remaining allegations therein contained.

VIII.

Denies generally and specifically each and every allegation contained in paragraphs XIV, XVI and XVII.

IX.

Answering paragraph XVIII defendant denies that there is now due and owing to the plaintiff by this defendant payment of said judgment, or any other judgment, together with interest and costs, or that there ever was or is due or owing from this defendant to plaintiff any sum or sums whatsoever.

Second Cause of Action

I.

Answering paragraph I of the Second Cause of Action, defendant incorporates by reference and makes a part hereof as though fully set forth herein, all the allegations contained in paragraphs I to IX, inclusive, of its answer to the First Cause of Action.

II.

Answering paragraph II plaintiff alleges that it was provided in said insurance contract that as one of the conditions of this defendant assuming the risks referred to in said contract, it was the duty of the insureds to at all times render to the defendant all cooperation and assistance in the securing of information and evidence and the attendance of

witnesses and in the conduct of suits; and alleges that the said Sam G. Richardson failed, neglected and refused to cooperate with this defendant in the securing of the information and attendance of witnesses, failed to render to the defendant at any time, or at all, any cooperation or assistance, and in fact failed to ever contact or notify defendant regarding the purported collision or of the subsequent purported service upon him of any summons and complaint in Superior Court [37] action number 516890, and failed to deliver same to defendant or to request defendant to defend said action; that the said Sam G. Richardson failed and neglected to notify this defendant of the date of trial and failed and neglected to appear at the trial of said action as a witness and defendant was not aware that said Sam G. Richardson had been served with summons and complaint in said action and was not requested to defend the said action on behalf of said Sam Richardson referred to in plaintiff's complaint.

For a Second, Separate and Distinct Affirmative Defense to Both Causes of Action, Defendant Alleges:

I.

Incorporates by reference with the same force and effect as though herein set out, all the denials and allegations of its first defense.

II.

That the policy of insurance referred to in plaintiff's amended complaint provided that the insur-

ance protection therein provided for was subject to certain special conditions, which said special conditions are as set out in plaintiff's Exhibit "A" and hereby made a part hereof, and among other things, provides that the insureds shall at all times render to this defendant all cooperation and assistance and to aid this defendant in securing information and evidence and the attendance of witnesses in the conduct of suits arising out of the use of the automobiles referred to in said policy of insurance; that the said Sam G. Richardson never at any time, prior to the entering of a default judgment against him, reported the happenings of the purported accident referred to in plaintiff's amended complaint to this defendant or to the named assureds; that the said Sam G. Richardson failed, neglected and refused to notify this defendant or the named assureds [38] that he was ever served with summons and complaint in said Superior Court action number 516890 and failed, neglected and refused to notify or in any way inform this defendant or the named assureds of the date of trial, and in fact, this defendant or the named assureds had no knowledge of said purported service of summons and complaint or said default or the setting of hearing to prove up damages until a time subsequent to the entry of judgment against said Sam G. Richardson; that the said Sam G. Richardson failed, neglected and refused to cooperate with this defendant or with the named assureds in the obtaining of any information and obtaining witnesses to said purported accident, and failed, neglected and refused to cooperate or assist this

defendant or the named assureds in the conduct of suits or in obtaining the attendance of witnesses and failed and neglected to appear and testify at the trial of said action, although able so to do, all to the substantial prejudice of this defendant.

Wherefore, this answering defendant prays that plaintiff take nothing by his complaint, that this defendant have judgment for its costs herein incurred, and for such other and further relief as to the court may seem proper.

TRIPP & CALLAWAY,

By /s/ F. V. LOPARDO.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed February 3, 1950. [39]

[Title of District Court and Cause.]

PLAINTIFF'S REQUEST FOR ADMISSIONS
(Pursuant to Rule 36, Federal Rules as Amended)

Plaintiff requests defendant, Royal Indemnity Company, within ten (10) days after service of this Request, to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the hearing of this cause.

I.

That each of the following statements of fact is true:

(1) That the 1940 Packard automobile, motor number C59614, California license number 10 L 343, was on April 9, 1946, in the possession of Sam Richardson also known as Sam G. Richardson as referred to in paragraph number IX of plaintiff's amended complaint.

(2) That Sam G. Richardson drove, operated and used said vehicle on April 9, 1946.

(3) That as of April 9, 1946, Sam G. Richardson had permission and consent of Roy R. Jordan as executor of the Estate of [41] Harry E. Blodgett, deceased, or as testamentary trustee of Harry E. Blodgett, or Blodgett's Auto Service, or Blodgett's Auto Service and Tours, or Harry E. Blodgett as referred to in paragraph X of plaintiff's amended complaint.

(4) That Sam G. Richardson drove, operated and used said vehicle on April 9, 1946, with the permission and consent of Roy R. Jordan as executor of the Estate of Harry E. Blodgett, deceased, or as testamentary trustee of Harry E. Blodgett, or of Blodgett's Auto Service, or of Blodgett's Auto Service and Tours, or of Harry E. Blodgett as referred to in paragraph X of plaintiff's amended complaint.

(5) That the said vehicle on April 9, 1946, was the vehicle involved in a collision accident with the plaintiff as referred to in paragraph XI of plaintiff's amended complaint.

(6) That the said collision accident and the

injuries resulting therefrom was the occasion and incident giving rise to plaintiff's said cause of action and judgment rendered thereon in the said Superior Court action referred to in plaintiff's amended complaint, as all referred to in paragraph XI in plaintiff's amended complaint.

(7) That on April 9, 1946, Sam Richardson, also known as Sam G. Richardson, drove said vehicle into and upon plaintiff as referred to in paragraph XI of plaintiff's amended complaint.

(8) That on April 9, 1946, Sam Richardson, also known as Sam G. Richardson, and said vehicle were at the place and at the time of the said collision accident, as referred to in paragraph XI of plaintiff's amended complaint.

(9) That the rental memorandum of Blodgett's Auto Service show that the residence of Sam Richardson to be as of April 7, 1946, 836 S. San Gabriel, San Gabriel, California.

(10) That business records as kept as original entries in the regular course of business, of the Sheriff of Los Angeles [42] County, State of California, is that Deputy Roy Carter served summons in said Superior Court action on Sam G. Richardson on the 3rd day of August, 1946, at 836 South San Gabriel, San Gabriel, California.

(11) That on June 7, 1946, George N. Olmstead in the Superior Court of the State of California in and for the County of Los Angeles filed suit No. 515192 against Sam G. Richardson, Harry E. Blodg-

ett, John Doe and Doe Company, a corporation, and Doe and Roe, a co-partnership, as the fictitious names of defendant, Harry E. Blodgett, and therein alleged in paragraph numbered VIII of his complaint "that defendant Harry E. Blodgett also known as H. E. Blodgett, doing business under the fictitious firm name of Blodgett's Auto Service or Blodgett's Rental Service was at all times mentioned herein the owner of the 1940 Packard automobile referred to herein; that defendant Sam G. Richardson was using and operating said automobile at the time and place mentioned herein with the permission, consent and acquiescence of the said defendant, Harry E. Blodgett," and that thereafter defendant herein on behalf of Roy Jordan as executor for the Estate of Harry E. Blodgett, deceased, by verified answer on June 27, 1946, admitted the allegations contained in the quotations hereinabove set forth; that the plaintiff in said suit, the injuries and damages claimed from an accident and the time and place thereof aforementioned are the same and identical as the plaintiff, the injuries and claimed damages from an accident and time and place thereof as that alleged in plaintiff's suit filed July 18, 1946, in the Superior Court of the State of California, in and for the County of Los Angeles, No. 516890 against Sam G. Richardson, Roy Jordan as Executor of the Estate of Harry E. Blodgett, deceased.

(12) That on April 17, 1947, this defendant as insurer for the representative of the Estate of Harry E. Blodgett, deceased, agreed in open court

to a stipulated judgment against said estate [43] and thereafter paid to plaintiff herein and therein the sum of Three Thousand Five Hundred Dollars (\$3,500.00) and received a satisfaction of judgment against said estate.

(13) That defendant received full payment of the premium charged for the insurance contract attached to plaintiff's amended complaint as Exhibit "A."

(14) That defendant received due and full co-operation and notice from Roy R. Jordon as executor of Estate of Harry E. Blodgett, deceased, in connection with occurrence of collision accident and suit referred to in plaintiff's amended complaint.

(15) That the Packard vehicle described in plaintiff's amended complaint was on or about April 7, 1946, rented by Blodgett's Auto Service or Blodgett's Auto Service and Tours in the City of Pasadena, County of Los Angeles, State of California, to Sam Richardson, also known as Sam G. Richardson, for the purpose of his using said vehicle as a passenger carrying automobile for an initial term expiring April 14, 1946.

(16) That the insurance contract referred to as Exhibit "A" in plaintiff's amended complaint was and is, as to the endorsement set out at Page 10, lines 29 through 32, inclusive, and Page 11, line 1, through 20, inclusive, typewritten; and that the provisions of said policy, as to the contents shown on Page 2, lines 20 through 32, inclusive; Page 3,

lines 1 through 34, inclusive; Page 4, lines 1 through 32, inclusive; Page 5, lines 1 through 33, inclusive; Page 6, lines 1 through 17, inclusive; Page 13, lines 1 through 33, inclusive; Page 14, lines 1 through 33, inclusive; Page 15, lines 1 through 32, inclusive; Page 16, lines 1 through 14, inclusive; Page 19, lines 1 through 32, inclusive; Page 20, lines 1 through 32, inclusive; Page 21, lines 1 through 5, inclusive, are printed words, phrases, sentences and paragraphs contained in said policy.

Dated this 15th day of February, 1950.

/s/ C. PAUL DuBOIS,

Attorney for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed February 15, 1950. [44]

[Title of District Court and Cause.]

PLAINTIFF'S MOTION TO STRIKE PORTIONS OF DEFENDANT'S ANSWER TO AMENDED COMPLAINT, FOR SUMMARY JUDGMENT ON THE PLEADINGS

(Rule 12 f, Rule 56 of Federal Rules as Amended)

The plaintiff moves the court as follows:

I.

To strike certain portions, hereafter set out, of defendant's answer to plaintiff's amended complaint because said allegations, individually or collectively, fail to state any sufficient defense to plaintiff's

causes of action, and that said allegations are immaterial and redundant.

Specification of Portions of Defendants' Answer to Plaintiff's Amended Complaint, Sought to Be Stricken:

(a) Page 2, lines 15-23, inclusive—"but in this connection defendant alleges that the said Sam G. Richardson did not notify defendant or the named assureds that he had ever been served with summons and complaint in said action; further, that defendant is informed and believes and thereupon alleges that the said Sam G. Richardson did not appear in court prior to the entry of his default or at the hearing of said action for the assessment of [46] damages and that no testimony was introduced on behalf of the said Sam G. Richardson and that judgment was entered in said action against him by default."

(b) Page 3, lines 20-32; Page 4, lines 1-8—"Answering paragraph II plaintiff alleges that it was provided in said insurance contract that as one of the conditions of this defendant assuming the risks referred to in said contract, it was the duty of the insureds to at all times render to the defendant all cooperation and assistance in the securing of information and evidence and the attendance of witnesses and in the conduct of suits; and alleges that the said Sam G. Richardson failed, neglected and refused to cooperate with this defendant in the securing of information and attendance of witnesses, failed to render to the defendant at any time, or at all, any cooperation or assistance, and

in fact failed to ever contact or notify defendant regarding the purported collision or of the subsequent purported service upon him of any summons and complaint in Superior Court action number 516890, and failed to deliver same to defendant or to request defendant to defend said action; that the said Sam G. Richardson failed and neglected to notify this defendant of the date of trial and failed and neglected to appear at the trial of said action as a witness and defendant was not aware that said Sam G. Richardson had been served with summons and complaint in said action and was not requested to defend the said action on behalf of said Sam Richardson referred to in plaintiff's complaint."

(c) Page 4, lines 18-32; Page 5, lines 1-16—
"That the policy of insurance referred to in plaintiff's amended complaint provided that the insurance protection therein provided for was subject to certain special conditions, which said special conditions are as set out in plaintiff's Exhibit "A" and hereby made a part hereof, and among other things, provides that the insureds shall at all times render to this defendant all cooperation and [47] assistance and to aid this defendant in securing information and evidence and the attendance of witnesses in the conduct of suits arising out of the use of the automobiles referred to in said policy of insurance; that the said Sam G. Richardson never at any time, prior to the entering of a default judgment against him, reported the happenings of

the purported accident referred to in plaintiff's amended complaint to this defendant or to the named assureds; that the said Sam G. Richardson failed, neglected and refused to notify this defendant or the named assureds that he was ever served with summons and complaint in said Superior Court action number 516890 and failed, neglected and refused to notify or in any way inform this defendant or the named assureds of the date of trial, and in fact, this defendant or the named assureds had no knowledge of said purported service of summons and complaint or said default or the setting of hearing to prove up damages until a time subsequent to the entry of judgment against said Sam G. Richardson; that the said Sam G. Richardson failed, neglected and refused to cooperate with this defendant or with the named assureds in the obtaining of any information and obtaining witnesses to said purported accident, and failed, neglected and refused to cooperate or assist this defendant or the named assureds in the conduct of suits or in obtaining the attendance of witnesses and failed and neglected to appear and testify at the trial of said action, although able so to do, all to the substantial prejudice of this defendant."

II.

For summary judgment, because the answer to plaintiff's amended complaint fails to state any sufficient defense to plaintiff's causes of action as

contained in plaintiff's amended complaint, and that plaintiff is entitled to judgment as a matter of law.

Dated: February 15, 1950.

/s/ C. PAUL DuBOIS,
Attorney for Plaintiff. [48]

To Tripp and Calloway, Attorneys for defendant,
Royal Indemnity Company, a corporation:

Please take notice that the undersigned will bring the above motion on for hearing before this court at the court room of James M. Carter in the United States Courthouse in the City of Los Angeles on the 27th day of February, 1950, at 10:00 a.m. or as soon thereafter as counsel can be heard.

/s/ C. PAUL DuBOIS,
Attorney for Plaintiff. [49]

[Title of District Court and Cause.]

STATEMENT OF REASON IN SUPPORT
OF MOTION

(Rule 3, d (b) Local Rules of United States
District Court)

These are contractual causes of action against an insurer on an insurance liability policy, by an insured party who has received a judgment for personal injuries and property damage arising out of an automobile collision, which judgment has not been satisfied. The judgment debtor is insured under the provisions of this policy.

Plaintiff herein the injured person, is given the right to maintain such action directly against the insurer under the provisions of the policy and the laws of California and the City of Pasadena.

The policy was issued pursuant to the requirements of an ordinance of the City of Pasadena which had as its purpose protection of the public.

Such insurance is compulsory and required under local law; consequently, there are no defenses to liability on such policy as a result of any act or omission on the part of the insured [50] which may prejudice the rights of a member of the public to be benefited who is a judgment creditor.

Defenses of lack of cooperation, notice, etc., are pleaded affirmatively by the defendant insurer. Since these would be acts or omissions of the insured, such defenses are not, as a matter of law, sufficient. Hence the motion to strike these defenses and for summary judgment as there is no other genuine issue of defense.

Further, reason for these motions is that the defendant's own policy guarantees payment direct to such a judgment creditor on his judgment against the insured driver.

Dated: This 15th day of February, 1950.

/s/ C. PAUL DuBOIS,

Attorney for Plaintiff. [51]

[Title of District Court and Cause.]

STATEMENT OF UNCONTROVERTED
FACTS

(Rule 3 (d) (2) Local Rules of
United States District Court)

That defendant, Royal Indemnity Company, a corporation, issued a written liability policy, attached as Exhibit "A" to plaintiff's amended complaint, dated February 16, 1946, to a named insured designated as Harry E. Blodgett doing business as Blodgett's Auto Service and Tours, Green Hotel, Corner of Green and Raymond Streets, Pasadena, Los Angeles County, California. That prior to April 9, 1946, Harry E. Blodgett did business in said County under the name of Blodgett's Auto Service or Blodgett's Auto Service and Tours in renting passenger drive-yourself automobiles for hire.

That about February 15, 1946, Harry E. Blodgett died while residing in the County of Los Angeles, State of California, and left an estate which included said you-drive rental business and that said business had as one of its assets the Packard automobile referred to in plaintiff's amended complaint.

That soon after February 15, 1946, Roy R. Jordan petitioned for and was appointed to be the executor of the Estate of Harry E. [52] Blodgett, Deceased, and thereafter became testamentary trustee under the Last Will and Testament of Harry E. Blodgett; that Roy E. Jordon was on April 9, 1946, conducting said you-drive business as an asset of said estate.

That in conducting said business Roy R. Jordon or

the Estate rented you-drive vehicles in the City of Pasadena, County of Los Angeles, State of California, with said vehicles to be used on the public streets of said City, County and State.

That said business was operated pursuant to a City of Pasadena Ordinance which required, prior to doing or conducting said business, that said business procure a public liability and property damage insurance policy with the policy being the same policy as Exhibit "A" of plaintiff's amended complaint; that said policy was applied for because of the Ordinance and was issued pursuant to the Ordinance and the said Ordinance was a part of the terms, covenants and agreements of said policy. That said policy was filed with the City of Pasadena and thereafter the City of Pasadena issued a written permit to Blodgett or said estate to conduct said you-drive rental business.

That about April 7, 1946, said business rented the Packard automobile described in plaintiff's amended complaint in the City of Pasadena, County of Los Angeles, State of California, to Sam Richardson for his use of said vehicle for an initial term expiring April 14, 1946, and that said rental to the said Richardson for said term of said automobile was with the consent of said business or Roy R. Jordon as executor of the estate owning said business.

That plaintiff herein, subsequent to April 9, 1946, instituted suits in the Superior Court of the State of California in and for the County of Los Angeles against Sam G. Richardson, also known as Sam Richardson for personal injuries and property

damage resulting from a collision accident occurring April 9, 1946, and thereafter [53] said Superior Court entered judgment in favor of plaintiff and against Sam Richardson, also known as Sam G. Richardson, in the form of personal injuries in the amount of Twenty-Five Thousand Dollars (\$25,000.00) and for property damage in the sum of Six Thousand Dollars (\$6,000.00) on the 17th day of September, 1946, together with interest at 7% thereon until paid, together with plaintiff's costs in the sum of Fourteen Dollars (\$14.00). That said judgment has become and is now final.

That prior to bringing this suit plaintiff has caused a demand to be made upon this defendant and that said defendant has not paid this plaintiff any sum on said judgment.

That prior to April 9, 1946, defendant, Royal Indemnity Company, a corporation, and Harry E. Blodgett or Roy R. Jordon as Executor of the Estate of Harry E. Blodgett, Deceased, or as Testamentary Trustee under the Last Will and Testament of Harry E. Blodgett, or Blodgett's Auto Service or Blodgett's Auto Service and Tours made a third party beneficiary contract in writing, which contract is the insurance policy annexed as Exhibit "A" in plaintiff's amended complaint, and that said contract was for the benefit and protection of any person on account of any loss by reason of liability imposed by law upon any of Harry E. Blodgett or Roy R. Jordon as Executor of the Estate of Harry E. Blodgett, Deceased, or as Testamentary Trustee under the Last Will and Testament of Harry E. Blodgett.

or Blodgett's Auto Service or Blodgett's Auto Service and Tours because of bodily injury or destruction of property sustained by such person as the result of the use of any automobile scheduled in said policy. That the Packard automobile described in plaintiff's amended complaint was one of the automobiles covered by said policy as of April 9, 1946, and that said automobile was an asset of and owned by Blodgett's Auto Service, Blodgett's Auto Service and Tours and the Estate of Harry E. Blodgett, Deceased. [54]

That as of April 9, 1946, the said policy or contract was in full force and effect.

Dated this 15th day of February, 1950.

/s/ C. PAUL DuBOIS,

Attorney for Plaintiff. [55]

[Title of District Court and Cause.]

AFFIDAVIT OF J. D. BRADY

State of California,

County of Los Angeles—ss.

J. D. Brady, being duly sworn, deposes and says:

That affiant is a lieutenant in the sheriff's office of Los Angeles County, State of California, and is assigned to the Civil Division; that in his office are kept the official records of service of process.

That said records show that in case No. 516890 of the Superior Court of the State of California, in and for the County of Los Angeles, entitled George

N. Olmstead vs. Sam G. Richardson, et al., that a deputy of the sheriff's office by the name of Roy Carter served summons and complaint in said action on Sam G. Richardson at 1:00 p.m. on August 3, 1946, at 804 South San Gabriel Boulevard, San Gabriel, California.

That a service ticket, being a part of said records, has a notation thereon in the handwriting of said Roy Carter which [56] states "Sam G. Richardson is 5 feet 7 or 8 inches, 150-160 pounds, black wavy hair, small mustache, he asked what it was all about and I showed him complaint and he then remarked 'Oh, that was something that happened three or four months ago.' "

/s/ J. D. BRADY.

Subscribed and sworn to before me this 14th day of February, 1950.

[Seal] /s/ JOHN E. SISSON,
Notary Public in and for
Said County and State. [57]

[Title of District Court and Cause.]

AFFIDAVIT OF GEORGE N. OLMSTEAD

State of California,
County of Los Angeles—ss.

George N. Olmstead, being duly sworn, deposes and says as follows:

That affiant is the plaintiff in the above-entitled cause, and is the same George N. Olmstead who was

and is plaintiff in that certain suit in the Superior Court of the State of California, in and for the County of Los Angeles, against Sam Richardson, also known as Sam G. Richardson, et al., being case numbers 516890 and 515192.

That affiant has not been paid nor received any sum or any amount or thing or things of value from Sam Richardson, also known as Sam G. Richardson, on affiant's judgment against the said Richardson. That the whole of said judgment and all thereof remains due and owing to affiant and is wholly unsatisfied.

/s/ GEORGE N. OLMSTEAD.

Subscribed and sworn to before me this 13th day of February, 1950.

[Seal] /s/ JOHN E. SISSON,
Notary Public and for
Said County and State. [58]

[Title of District Court and Cause.]

AFFIDAVIT OF WALTER N. HATCH IN
SUPPORT OF MOTION FOR SUMMARY
JUDGMENT

State of California,
County of Los Angeles—ss.

Walter N. Hatch, being duly sworn, deposes and says as follows:

That on, prior to and following April 9, 1946, affiant was a sergeant of and with the Police De-

partment of the City of San Gabriel, and that during the late evening hours and the early morning hours of the day of April 9, 1946, when George N. Olmstead was injured, affiant was on duty as a radio patrolman engaged in patrol work for said Police Department for said city, and that at about 2:50 o'clock a.m. affiant, while riding in said police car, affiant was dispatched to a location on South San Gabriel Boulevard, North of Valley Boulevard, at or about the 1200 block of South San Gabriel Boulevard; affiant immediately proceeded to said designated point and there found an injured male lying upon the surface of said street; affiant immediately commenced and thereafter continued and completed an official [59] investigation of the circumstances surrounding the injury to said male so found; that affiant ascertained that the identification documents upon the said male were in the name of George N. Olmstead and affiant thereafter personally ascertained that said male was George N. Olmstead, and affiant procured the attendance of Alford P. Olmstead who represented to affiant that he was an attorney licensed in the State of California and that he was the brother of the injured male and who said that the injured male was George N. Olmstead.

Further, that affiant ascertained of his own knowledge that Samuel G. Richardson, also known as Sam Richardson, was at the location where affiant found the injured male identified as George N. Olmstead; that affiant theretofore, had personally known the said Richardson as a San Gabriel city resident, at 836 South San Gabriel Boulevard, for a substantial

period prior to said date. That affiant immediately on arrival inquired as to the identification of the driver of the vehicle which had collided with the said injured male identified as George N. Olmstead and the said Richardson, almost immediately upon affiant's arrival at said location, stated to affiant that he, the said Richardson, was the driver of the Packard automobile involved in the collision with the injured male, George N. Olmstead, at a point of impact on the traveled surface of said San Gabriel Boulevard. Further, that said Richardson then stated to affiant that the vehicle driven by him was a rented vehicle, and affiant then ascertained that the registered owner of said vehicle was Blodgett's Rental Service, Hotel Green, Pasadena, Calif.; that said vehicle was a 1940 Packard sedan with California license No. 10 L 343.

That subsequent to said 9th of April, 1946, affiant thereafter had several conversations with the said Richardson over a period of the next 8 or 9 weeks and on those occasions the said Richardson again stated to affiant that he, the said [60] Richardson, had been the driver of the vehicle involved in a collision with a pedestrian identified as George N. Olmstead. That said Richardson continued to reside in and be about his usual residence at 836 San Gabriel Boulevard, San Gabriel, and operating a service Station at Grand and San Gabriel Blvd., for a period of about 8 or 9 weeks after April 9, 1946.

That affiant talked with said Richardson on these several occasions, in the course of making affiant's official investigation for and on behalf of the said Police Department.

That the matters hereinabove alleged and all of them are within the personal knowledge of affiant, and that affiant could and would so testify if called to court as to these matters hereinabove stated.

/s/ WALTER N. HATCH.

Subscribed and sworn to before me this 14th day of February, 1950.

[Seal] /s/ JOHN E. SISSON,
Notary Public in and for
Said County and State.

[Endorsed]: Filed February 15, 1950. [61]

[Title of District Court and Cause.]

PLAINTIFF'S INTERROGATORIES

Now comes the plaintiff and serves the following interrogatories upon the defendant, Royal Indemnity Company, a corporation, pursuant to Rule 33 of the Federal Rules as amended:

1. Was or is Royal Indemnity Company, a corporation, or any of its subsidiary insurance companies, or its parent companies, or its sister insurance companies, a party to any liability policy of insurance with Harry E. Blodgett or Roy R. Jordon as Executor of the Estate of Harry E. Blodgett, Deceased, or as Testamentary Trustee under the Last Will and Testament of Harry E. Blodgett, or "Blodgett's Auto Service" or "Blodgett's Auto Service and Tours," which said policy pertains to any excess liability or re-insurance liability over and apart

from the policy annexed as Exhibit "A" in plaintiff's amended complaint, and pertaining to bodily injury or property damage as the result of negligence in the operation, maintenance, use or ownership of the rental vehicles scheduled in Exhibit "A" to plaintiff's amended complaint with said policy or [75] policies dated prior to April 9, 1946, and by their terms extending for some period subsequent to April 9, 1946?

2. Is there on file with the police department of the City of San Gabriel, the Sheriff's Office of the County of Los Angeles at its records office in the Hall of Justice, Los Angeles, California, and at its substation in Temple City, County of Los Angeles, State of California, or at the office of the State of California Highway Patrol at its office in Pomona, California, written original reports by some or all of said agencies concerning the collision of April 9, 1946, described in plaintiff's amended complaint, which said reports and all of them show that only Sam Richardson, also known as Sam G. Richardson, was the driver and in possession of and operating the certain Packard automobile on April 9, 1946, and on South San Gabriel Boulevard at the time of its impacting plaintiff; and that Sam Richardson, also known as Sam G. Richardson, so represented himself immediately after the accident, to said investigating officers that he was the driver and in possession of said Packard automobile at said time and place?

3. Since what dates have said reports been filed?

4. Did Sam Richardson, also known as Sam G. Richardson, sign for the sheriff of the County of Los Angeles and the California Highway Patrol, a written original report pertaining to an injury to a person resulting from a collision with a Packard vehicle which he was driving, which collision occurred on April 9, 1946, on South San Gabriel Boulevard which report records at said time his Packard automobile as described in plaintiff's amended complaint was the vehicle involved?

5. On what date did defendant, Royal Indemnity Company, a corporation, first know of the contents of said reports as referred to in numbers 2, 3 or 4?

6. In what respect or to what extent was the Packard automobile not being driven, operated or used on April 9, 1946, [76] on South San Gabriel Boulevard, at the time of the collision referred to in plaintiff's amended complaint, with the permission and consent of Harry E. Blodgett or Roy R. Jordon as Executor of the Estate of Harry E. Blodgett, Deceased, or as Testamentary Trustee under the Last Will and Testament of Harry E. Blodgett, or "Blodgett's Auto Service" or "Blodgett's Auto Service and Tours"?

7. Did plaintiff sustain bodily injuries and thereafter expend money and incur obligations for medical care and treatment as a result of said collision occurring on April 9, 1946, on South San Gabriel Boulevard in the County of Los Angeles?

8. Was the Packard automobile described in plaintiff's amended complaint the vehicle involved

in said collision referred to in the interrogatory numbered 7?

9. Was Sam Richardson, also known as Sam G. Richardson, the driver of said Packard automobile at said time and place as referred to in plaintiff's two interrogatories numbered 7 and 8?

10. Do the said investigation reports by the police, sheriff's office and California Highway Patrol show the residence of the driver of the Packard automobile involved in the aforesaid collision, to wit, Sam G. Richardson, to be 836 South San Gabriel Boulevard, San Gabriel, California?

11. Did Roy R. Jordon as Executor of the Estate of Harry E. Blodgett, Deceased, or as Testamentary Trustee under the Last Will and Testament of Harry E. Blodgett, or "Blodgett's Auto Service" or "Blodgett's Auto Service and Tours" recover the said Packard automobile from the vicinity of 836 South San Gabriel Boulevard after April 9, 1946?

12. What did Harry E. Blodgett or Roy R. Jordon as Executor of the Estate of Harry E. Blodgett, Deceased, or as Testamentary Trustee under the Last Will and Testament of Harry E. Blodgett, "Blodgett's Auto Service" or "Blodgett's Auto Service and Tours," require Sam Richardson, also known as Sam G. Richardson, [77] to present or do on or about April 7, 1946, prior to renting said Packard sedan to the said Richardson?

13. What records did Harry E. Blodgett or Roy

R. Jordon as Executor of the Estate of Harry E. Blodgett, Deceased, or as Testamentary Trustee under the Last Will and Testament of Harry E. Blodgett, "Blodgett's Auto Service" or "Blodgett's Auto Service and Tours" make recording the nature and contents of any documents, certificates, licenses or like proof exhibited by the said Richardson prior to renting said vehicle to the said Richardson as referred to in plaintiff's interrogatory numbered 12?

14. Did Roy Jordon on or prior to April 9, 1946, write or place insurance for defendant Royal Indemnity Company, a corporation, and maintain an insurance office in the City of Pasadena, State of California?

15. What was the date prior to June 27, 1946, and subsequent to April 9, 1946, that Roy Jordon or his representatives communicated with or reported to defendant, Royal Indemnity Company, a corporation, notice that the aforesaid Packard vehicle driven by Sam Richardson, also known as Sam G. Richardson, had been involved in a collision on South San Gabriel Boulevard on April 9, 1946?

16. Did Royal Indemnity Company, a corporation, on behalf of Roy R. Jordon as Executor of the Estate of Harry E. Blodgett, Deceased, or as Testamentary Trustee under the Last Will and Testament of Harry E. Blodgett, or "Blodgett's Auto Service" or "Blodgett's Auto Service and Tours" commence to investigate the circumstances surrounding and talk to witnesses about the April 9, 1946, collision at least in June, 1946, and continuing thereafter?

17. Did Roy Jordon or his representatives at the same time as the date of Royal Indemnity Company's answer to plaintiff's interrogatory numbered 15, communicate or report to defendant that the said Packard vehicle driven by Sam Richardson, also known [78] as Sam G. Richardson, had collided on April 9, 1946, with a pedestrian on South San Gabriel Boulevard, a public right of way?

18. Did Roy Jordon or his representatives at the same time as the date of defendant Royal Indemnity Company's answer to plaintiff's interrogatory numbered 15, communicate with or report to defendant Royal Indemnity Company, a corporation, that said pedestrian was or claimed to be seriously injured physically?

19. When did defendant, Royal Indemnity Company, a corporation, receive a copy of the summons and complaint in Case No. 515192, in the Superior Court of the State of California, in and for the County of Los Angeles, entitled "George N. Olmstead, et al., v. Sam G. Richardson, Harry E. Blodgett, et al.," from Roy Jordon individually or as executor of the Estate of Harry E. Blodgett, Deceased?

20. What conversations or communications did representatives of defendant Royal Indemnity Company, a corporation, have with Sam Richardson, also known as Sam G. Richardson, subsequent to April 9, 1946, and prior to April 17, 1947?

21. When did defendant, Royal Indemnity Company, a corporation, request any assistance, personal

attendance or cooperation of or from Sam Richardson, also known as Sam G. Richardson, in connection with said collision and how was said request communicated and what was requested?

22. What could Sam Richardson, also known as Sam G. Richardson, have truthfully testified to at time of trial in Superior Court in case No. 516890 or done in attending the said trial other than tending to establish his and the defendant Royal Indemnity Company's liability to plaintiff?

23. What cooperation, assistance, attendance or evidence pertaining to said collision in connection with case No. 516890 did defendant, Royal Indemnity Company, a corporation, request of Sam Richardson, also known as Sam G. Richardson, and when was [79] such request made?

24. Did Harry E. Blodgett or Roy R. Jordon as Executor of the Estate of Harry E. Blodgett, Deceased, or as Testamentary Trustee under the Last Will and Testament of Harry E. Blodgett, or "Blodgett's Auto Service" or "Blodgett's Auto Service and Tours," subsequent to April 9, 1946, fail in any respect to notify, attend, assist or cooperate with defendant, Royal Indemnity Company, a corporation, regarding defending Superior Court suits No. 515192 or 516890?

25. Did defendant, Royal Indemnity Company, a corporation, subsequent to April 9, 1946, and prior to April 17, 1947, decline or refuse to defend Sam Richardson, also known as Sam G. Richardson, in

either or both Superior Court actions hereinabove referred to?

26. What probative facts occurred subsequent to April 9, 1946, to prejudice in any wise defendant, Royal Indemnity Company, a corporation, in connection with defending either of the two Superior Court suits hereinabove referred to or on its liability on its policy annexed as Exhibit "A" in plaintiff's amended complaint?

27. How many full time investigators, adjustors or representatives regarding Court actions did Royal Indemnity Company, a corporation, employ in its Los Angeles County operations during the period April 9, 1946, to September 12, 1946?

28. Was examination of accident investigation notes, memoranda or reports compiled by the police department, sheriff's office or California Highway Patrol regarding the aforesaid collision continuously from April 9, 1946, to the present time, available to defendant, Royal Indemnity Company, a corporation?

29. Did defendant, Royal Indemnity Company, a corporation, have exclusive control of defending or the opportunity to defend Superior Court Actions 515192 and 516890 entitled "George N. Olmstead vs. Sam G. Richardson, H. E. Blodgett, Roy Jordon as [80] Executor of the Estate of Harry E. Blodgett, Deceased, et al," from June, 1946, and thereafter?

30. What, if anything, did defendant, Royal

Indemnity Company, a corporation, tender, make or attempt to make concerning any defense of Sam Richardson, also known as Sam G. Richardson, at any time, in the two Superior Court suits described in plaintiff's interrogatory numbered 29?

31. Has Royal Indemnity Company, a corporation, paid plaintiff or his representatives any portion of plaintiff's judgment against Sam Richardson, also known as Sam G. Richardson?

32. What conditions or requirements contained in the policy annexed as Exhibit "A" of plaintiff's amended complaint have not, as to this plaintiff, been complied with or performed?

33. What did defendant, Royal Indemnity Company, a corporation, or its local representatives know as of February 16, 1946, and prior to April 9, 1946, of automobiles being rented by Harry E. Blodgett or Roy R. Jordon as Executor of the Estate of Harry E. Blodgett, Deceased, or as Testamentary Trustee under the Last Will and Testament of Harry E. Blodgett, or "Blodgett's Auto Service" or "Blodgett's Auto Service and Tours" and, after rental in the City of Pasadena, being frequently and commonly driven and operated by renters and drivers throughout Southern California and outside of the City of Pasadena?

34. At any time, did defendant Royal Indemnity Company, a corporation, make any attempt to intervene, appear for or make any formal motions for or on behalf of Sam Richardson, also known as

Sam G. Richardson, in Superior Court case number 516890?

Plaintiff, pursuant to Rule 33 of the Federal Rules as amended, requires that defendant, Royal Indemnity Company, a corporation, fully answer each of the foregoing interrogatories within fifteen (15) days after service hereof upon it or [81] its attorney.

Dated this 10th day of March, 1950.

/s/ C. PAUL DuBOIS,
Attorney for Plaintiff.

Receipt of Copy Acknowledged.

[Endorsed]: Filed March 13, 1950. [82]

[Title of District Court and Cause.]

ANSWERS TO PLAINTIFF'S INTERROGATORIES

Comes now the defendant and for answer to plaintiff's interrogatories, admits, denies and alleges as follows:

1. The only policy of insurance between the parties mentioned in Interrogatory Number 1 and this defendant, is that policy annexed as Exhibit "A" to plaintiff's amended complaint.

2. This defendant is not in possession of any of the said reports, and has no information or belief upon which to answer the interrogatories relating to the said reports.

3-4. This defendant has no information or belief upon which to answer these interrogatories.

5. This defendant has never known the exact contents of the said reports.

6. This defendant is unable to answer this interrogatory since it has no information or belief as to whether the said [84] vehicle was being driven, operated, or used pursuant to that certain rental agreement referred to by plaintiff.

7-8-9-10-11-12-13. This defendant does not have sufficient information or belief upon which to answer these interrogatories.

14. Yes.

15. On or about June 12, 1946, Roy Jordon forwarded to this defendant a copy of the complaint served upon him in Superior Court case Number 515192 and the only notice or knowledge received from Roy Jordan as to the alleged collision was contained in the said complaint.

16. Yes, the said investigation was commenced a few days after the receipt of the complaint referred to in the answer to Interrogatory Number 15 above.

17. See the answer to Interrogatory Number 15.

18. No.

19. See the answer to Interrogatory Number 15.

20-21. On or about December 19, 1946, an investigator of this defendant orally requested the same

Sam G. Richardson to inform him as to the facts surrounding the alleged collision.

22. This defendant has no information or belief as to what the said Sam G. Richardson could have truthfully testified to at the time of trial; however, this defendant does not believe that he would have testified to any fact tending to establish his liability to plaintiff.

23. See the answers to Interrogatories 20 and 21.

24. No.

25. No, this defendant was never requested to defend Richardson in any legal action, nor was it informed that the said Richardson had ever been served in any action.

26. A default judgment was taken against the said Richardson without knowledge on the part of this defendant. [85] Further, this defendant had not been notified that Richardson had ever been served, and had never received any request on the part of the said Richardson to furnish any defense for him.

27. About seven.

28. This defendant has no information or belief upon which to answer this interrogatory.

29. No.

30. None.

31. This defendant has paid \$3,500.00 on the part of Roy Jordan, executor of the estate of Harry Blodgett.

32. This defendant has no information or belief upon which to answer this interrogatory.

33. Nothing.

34. No.

TRIPP & CALLAWAY,

By /s/ F. V. LOPARDO,

Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 29, 1950. [86]

[Title of District Court and Cause.]

ANSWERS TO PLAINTIFF'S REQUEST
FOR ADMISSIONS

Comes now the defendant Royal Indemnity Company, and for reply to plaintiff's request for admissions, admits, denies and alleges as follows:

Answer to Request No. 1: Defendant admits that the said Packard was in the possession of Sam Richardson on the date alleged.

Answer to Request No. 2: Defendant admits that Sam G. Richardson drove, operated and used the said vehicle on the alleged date.

Answer to Request No. 3: Defendant specifically denies that the said Sam G. Richardson had the permission or consent of Roy R. Jordan to drive or operate or use the said vehicle at the time and place of said accident.

Answer to Request No. 4: Defendant refers to its answers to request number 3 above and by its reference thereto incorporates [87-A] herein the said answer as though fully set forth herein.

Answer to Request No. 5: Defendant admits that the said vehicle was involved in an accident with the plaintiff on or about the time alleged.

Answer to Request No. 6: Defendant admits that the said accident and the injuries purportedly resulting therefrom were the basis of plaintiff's cause of action.

Answer to Request No. 7: Defendant admits that there was a collision between plaintiff and Sam G. Richardson at or about the time and place alleged but specifically denies the remaining allegations referred to in the said request.

Answer to Request No. 8: Defendant admits that there was a collision between plaintiff and Sam G. Richardson at or about the time and place alleged but specifically denies the remaining allegations referred to in the said request.

Answer to Request No. 9: Defendant admits that the said rental memorandum shows the residence of Sam Richardson to be 836 South San Gabriel, San Gabriel, California, as of April 7, 1946.

Answer to Request No. 10: Defendant cannot truthfully admit or deny the contents of the records of the Sheriff of Los Angeles County in regard to service of summons upon the said Sam Richardson

for the reason that it has never inspected any such records, but in this connection defendant specifically denies that the said Sam Richardson was ever personally served with summons or complaint as alleged by plaintiff, or otherwise legally served with such summons and complaint.

Answer to Request No. 11: Defendant admits that in Superior Court suit number 515192 plaintiff alleged in substance or effect "That Sam G. Richardson was using and operating said automobile at the time and place mentioned herein with the permission, consent and acquiescence of the said defendant, Harry E. Blodgett." Defendant admits that it omitted to plead to the paragraph [87-B] containing these allegations through inadvertence and in this connection defendant specifically denies the said allegations.

Answer to Request No. 12: Defendant admits that on or about the said date it agreed in open court to a stipulated judgment against the estate of Harry E. Blodgett and thereafter paid to plaintiff the sum of \$3,500.00 and received a full satisfaction of judgment therefor.

Answer to Request No. 13: Defendant admits that it received full payment of the premium charged for the insurance contract attached to plaintiff's amended complaint as Exhibit "A."

Answer to Request No. 14: Defendant admits that the said Roy Jordan cooperated with it to the best of his ability, but in this connection defendant alleges that the first and only notice of accident

received from the said Jordan consisted of a notification of the contents of the summons and complaint in the alleged action which were served upon said Jordan.

Answer to Request No. 15: Defendant admits that the vehicle described in plaintiff's amended complaint was rented by the Blodgett Auto Service on or about the date alleged, in the City of Pasadena, to Sam Richardson for an initial term expiring April 14, 1946.

Answer to Request No. 16: Defendant admits the matter contained in this request.

TRIPP & CALLAWAY,

By /s/ HULEN C. CALLAWAY,

Attorneys for Defendant.

Duly verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 7, 1950. [87-C]

[Title of District Court and Cause.]

MOTION FOR LEAVE TO FILE AMENDMENT
TO ANSWER

Comes Now the defendant, Royal Indemnity Company, a corporation, and moves the court for leave to file an amendment to its answer heretofore filed on February 3, 1950, to the amended complaint; and for reason therefor states:

That on April 10, 1950, it was discovered for the

first time that Sam G. Richardson had never been served with summons or complaint in the case of George N. Olmstead, etc., vs. Sam G. Richardson, et al., Los Angeles Superior Court number 516890;

That this amendment is necessary and material to the defense of the above-entitled action by this defendant.

That this motion will be based on the record of the above-entitled case, all pleadings and papers filed therein and hereafter, and on the affidavits of Hulen C. Callaway, Sam G. Richardson, Elizabeth E. Richardson, George Hosey, Robert E. Dunne and R. W. Clayton. [88]

To Plaintiff and C. Paul DuBois His Attorney:

Please Take Notice That the undersigned will bring the above motion on for hearing before this Court at the courtroom of the Honorable James M. Carter, in the United States Courthouse in the City of Los Angeles on May 15, 1950, at 10:00 a.m., or as soon thereafter as counsel may be heard.

TRIPP & CALLLAWAY,

By /s/ HULEN C. CALLAWAY,

Attorneys for Defendant.

Points and Authorities

A party may amend his pleadings at any time with leave of court. This amendment may be made upon motion even after judgment.

Rule 15, F.R.C.P.

Downey v. Palmer,

27 Fed. Supp. 993

Di Trapani v. M. A. Henry Co.,
7 FRD 123

Receipt of Copy acknowledged.

[Endorsed]: Filed May 5, 1950. [89]

[Title of District Court and Cause.]

AMENDMENT TO ANSWER

Comes Now the defendant Royal Indemnity Company, a corporation, after leave of court first had and obtained, and files this, its Amendment to Answer to Amended Complaint on file herein by adding to the said Answer the following affirmative defense:

“For a Further, Separate and Distinct Affirmative Defense to Both Causes of Action, Defendant Alleges:

I.

That the said judgment rendered against Sam G. Richardson in the case of George N. Olmstead, by Alford P. Olmstead, his Guardian ad Litem vs. Sam G. Richardson, Roy Jordan, Individually, as Executor of the Estate of Harry E. Blodgett, Deceased, etc., et al., Los Angeles Superior Court number 516890, was and is void for the reason that the said Superior Court of the State of California in and for the County of Los Angeles never acquired jurisdiction [91] over the said Sam G. Richardson in that the said Sam G. Richardson was never at

any time personally or properly served with summons or complaint in the aforesaid action.”

TRIPP & CALLAWAY,

By /s/ HULEN C. CALLAWAY,

Attorneys for Defendant.

Receipt of Copy Acknowledged.

Lodged May 5, 1950. [92]

[Title of District Court and Cause.]

ORDER

A motion having regularly been made by the plaintiff above named, and the above-named cause coming on this 3rd day of April, 1950, to be heard on said motion of plaintiff for an order to strike:

(a) Page 2, line 15-23, inclusive—“but in this connection defendant alleges that the said Sam G. Richardson did not notify defendant or the named assureds that he had ever been served with summons and complaint in said action; further, that defendant is informed and believes and thereupon alleges that the said Sam G. Richardson did not appear in court prior to the entry of his default or at the hearing of said action for the assessment of damages and that no testimony was introduced on behalf of the said Sam G. Richardson and that judgment was entered in said action against him by default.” [94]

(b) Page 3, lines 20-32; Page 4, lines 1-8—“Answering paragraph II plaintiff alleges that it was provided in said insurance contract that as one

of the conditions of this defendant assuming the risks referred to in said contract, it was the duty of the insureds to at all times render to the defendant all cooperation and assistance in the securing of information and evidence and the attendance of witnesses and in the conduct of suits; and alleges that the said Sam G. Richardson, failed, neglected and refused to cooperate with this defendant in the securing of information and attendance of witnesses, failed to render to the defendant at any time, or at all, any cooperation or assistance, and in fact failed to ever contact or notify defendant regarding the purported collision or of the subsequent purported service upon him of any summons and complaint in Superior Court action number 516890, and failed to deliver same to defendant or to request defendant to defend said action; that the said Sam G. Richardson failed and neglected to notify this defendant of the date of trial and failed and neglected to appear at the trial of said action as a witness and defendant was not aware that said Sam G. Richardson had been served with summons and complaint in said action and was not requested to defend the said action on behalf of said Sam Richardson referred to in plaintiff's complaint."

(c) Page 4, lines 18-32; Page 5, lines 1-16—"That the policy of insurance referred to in plaintiff's amended complaint provided that the insurance protection therein provided for was subject to certain special conditions, which said special conditions are as set out in plaintiff's Exhibit "A" and hereby made a part hereof, and among other things, pro-

vides that the insureds shall at all times render to this defendant all cooperation and assistance and to aid this defendant in securing information and evidence and the attendance of witnesses in the conduct of suits arising out of the use of the automobiles referred to in said policy of insurance; [95] that the said Sam G. Richardson never at any time, prior to the entering of a default judgment against him, reported the happenings of the purported accident referred to in plaintiff's amended complaint to this defendant or to the named assureds; that the said Sam G. Richardson failed, neglected and refused to notify this defendant or the named assureds that he was ever served with summons and complaint in said Superior Court action number 516890 and failed, neglected and refused to notify or in any way inform this defendant or the named assureds of the date of trial, and in fact, this defendant or the named assureds had no knowledge of said purported service of summons and complaint or said default or the setting of hearing to prove up damages until a time subsequent to the entry of judgment against said Sam G. Richardson; that the said Sam G. Richardson failed, neglected and refused to cooperate with this defendant or with the named assureds in the obtaining of any information and obtaining witnesses to said purported accident, and failed, neglected and refused to cooperate or assist this defendant or the named assureds in the conduct of suits or in obtaining the attendance of witnesses and failed and neglected to appear and testify at the trial of said action, although able so to do,

all to the substantial prejudice of this defendant.” As portions of the answer of Royal Indemnity Company, a corporation, to plaintiff’s amended complaint, and counsel being heard for the respective parties and due deliberation having been had, and on reading and filing the affidavits of J. D. Brady verified February 14, 1950, George N. Olmstead verified February 13, 1950, and Walter N. Hatch verified February 14, 1950, it is hereby ordered that plaintiff’s motion to strike be and the same hereby is sustained and granted and that said portions of said answer hereinabove set out and all thereof be stricken from the record herein.

/s/ JAMES M. CARTER,
Judge.

Enter.

Dated: 4/27/50.

Approved as to Form.

Receipt of Copy acknowledged.

[Endorsed]: Filed April 27, 1950. [96]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

(Proposed by Plaintiff, as adopted by the Court.)

The above-entitled cause came on regularly for disposition on plaintiff’s motion to strike and plaintiff’s motion for summary judgment before the Honorable James M. Carter, District Judge of the above-entitled court, and said motions were orally

argued, on the third day of April, 1950; that plaintiff appeared by his attorney, C. Paul DuBois; that defendant, Royal Indemnity Company, a corporation, appeared by its attorneys, Tripp & Callaway by F. V. Lopardo.

That after hearing the arguments and examining the pleadings, motions, and affidavits in support of the motions with no counter-affidavits offered or submitted by said defendant in opposition to said motions, memoranda of points and authorities having been heretofore filed in support of and in opposition to said motion, and the court having considered said defendant's [98] answers to plaintiff's interrogatories and said defendant's answers to plaintiff's request for admissions and the matter having been submitted to the court for its decision, and the court being fully advised in the premises, now makes the following findings of fact and conclusions of law:

Findings of Fact

I.

That it is true that defendant, Royal Indemnity Company, a New York corporation, did enter into a written agreement effective February 16, 1946, in tenor and in form as contained in Exhibit A of plaintiff's amended complaint. That said agreement was in full force and effect on April 9, 1946.

II.

That it is true that the City of Pasadena, a municipal corporation, had theretofore adopted an

ordinance, being Ordinance No. 3041 as amended to November 1, 1945, which said ordinance was entitled "An Ordinance of the City of Pasadena Regulating the Operation of Certain Motor Propelled Vehicles, Drive-Yourself Vehicles, Vehicles Transporting Passengers for Compensation or for Sight-Seeing Purposes Upon the Public Streets and Prescribing Penalties for the Violations Thereof."

III.

That it is true that said ordinance was in effect on February 16, 1946, April 7, 1946, and on April 9, 1946.

IV.

That it is true that said ordinance was by its terms declaratory of public policy that pedestrians or any other person who may be injured as a result of a you-drive business venture putting a dangerous instrumentality such as an automobile into the possession of an irresponsible driver, be protected against otherwise uncompensated damage resulting from negligent operation [99] or use thereof by any person responsible for such operation.

V.

That it is true that the State of California had, prior to November 1, 1945, by Vehicle Code Section 459, adopted a statute which had not, as of April 9, 1946, been repealed or modified, providing that local authorities within the reasonable exercise of the police power may adopt rules and regulations

by ordinance on the licensing and regulating of the operation of vehicles for hire.

VI.

That it is true that Harry E. Blodgett or the Estate of Harry E. Blodgett, deceased, or H. E. Blodgett doing business as Blodgett's Auto Service and Tours, Blodgett's Auto Service and Tours, Roy R. Jordan as executor of the estate of Harry E. Blodgett, deceased, Roy R. Jordan as testamentary trustee under the Last Will and Testament of Harry E. Blodgett, were on April 7, 1946, and on April 9, 1946, the named insureds within the terms of said Exhibit A.

VII.

That it is true that said agreement, Exhibit A, was a required and compulsory undertaking pursuant to said ordinance of the City of Pasadena.

VIII.

That it is true that the original agreement, of which Exhibit A is a copy, is typewritten as to the portions thereof set out at Page 10, lines 29 through 32, inclusive; page 11, lines 1 through 20, inclusive, of said Exhibit A; and that the original agreement as to the contents set out at page 2, lines 20 through 32, inclusive; page 3, lines 1 through 34, inclusive; page 4, lines 1 through 32, inclusive; page 5, lines 1 through 33, inclusive; page 6, lines 1 through 17, inclusive; page 13, lines 1 through 33, inclusive; page 14, lines 1 through 33, inclusive; page

15, lines 1 [100] through 32, inclusive; page 16, lines 1 through 14, inclusive; page 19, lines 1 through 32, inclusive; page 20, lines 1 through 32, inclusive; page 21, lines 1 through 5, inclusive, are all printed words, phrases, sentences and paragraphs contained in said policy undertaking.

IX.

That it is true that on April 9, 1946, the described Packard automobile was in the possession of Sam Richardson, also known as Sam G. Richardson.

X.

That it is true that on April 7, 1946, the above-named insureds had consented to and permitted the additional insured, Sam Richardson, to drive and had rented and delivered possession of said Packard automobile for an initial term expiring April 14, 1946, for purposes of his using said vehicle.

XI.

That it is true that said delivery of possession and rental was made in the City of Pasadena, County of Los Angeles, State of California.

XII.

That it is true that in connection with said delivery of possession, rental and consent to operation, Sam Richardson gave to said named insureds his residence address as being 836 South San Gabriel, San Gabriel, California.

XIII.

That it is true that on April 9, 1946, said Packard automobile while being driven by the said Sam Richardson, with the permission and consent of the named insureds, was involved in a collision accident with plaintiff herein in the 1200 block, South San Gabriel Boulevard.

XIV.

That it is true that the southerly boundaries of the [101] City of Pasadena terminate at about 620 South San Gabriel Boulevard.

XV.

That it is true that said collision accident occurred outside of the physical boundaries of the City of Pasadena, a municipal corporation.

XVI.

That it is true that plaintiff in said collision accident at said time and place sustained bodily injuries and property damage.

XVII.

That it is true that the said Sam Richardson, receiving possession of said Packard automobile on April 7, 1946, under a rental agreement with the named insureds was the driver of said vehicle on April 9, 1946, at the time of the aforesaid collision accident with plaintiff, and was also the **Sam Richardson who was named a defendant in a civil suit in Superior Court of the State of California**

in and for the County of Los Angeles, wherein plaintiff herein took judgment against Sam Richardson on account of bodily personal injuries in the sum of \$25,000.00 and on account of property damage in the sum of \$6,000.00 on the 12th day of September, 1946.

XVIII.

That it is true that defendant, Royal Indemnity Company, a New York corporation, had on or about June 12, 1946, actual notice of said collision accident and of the time, place and circumstances thereof, and that plaintiff herein then claimed personal injuries and property damage, and that plaintiff herein had filed a civil suit in negligence for damages against the said Sam Richardson and the named insureds as the result of negligence on the part of Sam Richardson in his operation of said Packard vehicle during the rental period for which the named insureds had consented to his use and given possession of said Packard vehicle. [102]

XIX.

That it is true that Royal Indemnity Company, a New York corporation, received full payment of its premium charge against the named insureds on all rental charges for the rental of said Packard automobile at said time.

XX.

That it is true that plaintiff's judgment and all thereof against Sam Richardson, also known as Sam G. Richardson, was and is unpaid, and that interest

at 7% on said judgment from September 12, 1946, and all thereof, was and is unpaid, together with plaintiff's allowed costs of suit in said Superior Court action in the sum of \$14.00.

XXI.

That it is true that a few days after June 12, 1946, defendant, Royal Indemnity Company, a New York corporation, commenced to investigate the circumstances surrounding and talked to witnesses about the collision accident hereinabove referred to, and continued in the same thereafter to and at least as late as December 19, 1946.

XXII.

That it is true that during the period from June 12, 1946, to December 19, 1946, defendant, Royal Indemnity Company, a New York corporation, only orally requested information from Sam Richardson, its additional insured, in connection with said collision accident.

XXIII.

That it is true that the estate of Harry E. Blodgett, deceased, and Roy R. Jordan as executor of the estate of Harry E. Blodgett, deceased, and as testamentary trustee under the Last Will and Testament of Harry E. Blodgett, and Blodgett's Auto Service, and Blodgett's Auto Service and Tours, did, subsequent to April 9, 1946, cooperate in all respects with defendant, Royal [103] Indemnity Company, in notifying said defendant and

forwarding of suit papers, attending hearings or conferences and in defending against plaintiff's Superior Court civil suits for damages for personal injuries and property damage.

XXIV.

That it is true that subsequent to April 9, 1946, defendant, Royal Indemnity Company, a New York corporation, was not prejudiced in any wise in their defense of liability under Exhibit A except that a judgment for personal injuries and property damage was taken by plaintiff against this defendant's additional insured, Sam G. Richardson.

XXV.

That it is true that defendant, Royal Indemnity Company, a New York corporation, having actual knowledge of the pendency of this plaintiff's claims, had the opportunity to defend its additional insured, Sam G. Richardson, in said damage suits.

XXVI.

That it is true that defendant, Royal Indemnity Company, a New York corporation, did not tender, make or attempt to make any defense of its additional insured, Sam Richardson, in plaintiff's civil damage actions in the Superior Court.

XXVII.

That it is true that defendant, Royal Indemnity Company, a New York corporation, did not make

any attempt to intervene, appear for, or make any motions in said Superior Court civil damage actions for or on behalf of this defendant's additional insured, Sam Richardson.

XXVIII.

That it is true that defendant, Royal Indemnity Company, a New York corporation, in its defense of Harry E. Blodgett in connection with this plaintiff's Superior Court action for civil damages, in a verified answer for said named insured of [104] June 27, 1946, admitted that the Packard vehicle was being used and operated by Sam G. Richardson at the time and place of the aforesaid collision accident with the permission, consent and acquiescence of the named insured.

XXIX.

Ordered stricken 6-26-50.

XXX.

That it is true that defendant, Royal Indemnity Company, a New York corporation, in preparing its insurance policy as embodied in Exhibit A of plaintiff's amended complaint has omitted and refrained from including any word, phrase, sentence or language in any wise restricting the effect of its undertaking to the area within the boundaries of the City of Pasadena.

XXXI.

That it is true that defendant, Royal Indemnity Company, a New York corporation, and its named insureds filed prior to April 7, 1946, the original policy of which Exhibit A of plaintiff's amended complaint is a copy, with the City of Pasadena.

XXXII.

That it is common knowledge that automobiles rented in 1946 in the City of Pasadena are not necessarily intended to be entirely confined, as to their operations, to the municipal limits or physical boundaries of the City of Pasadena.

XXXIII.

That defendant, Royal Indemnity Company's pleadings and papers in opposition to plaintiff's motion raise no genuine issue of fact as to any material matter.

Conclusions of Law

I.

That Sam Richardson, also known as Sam G. Richardson, [105] was on April 7, 1946, and on April 9, 1946, an additional insured within the terms of Exhibit A.

II.

That the scope of defendant Royal Indemnity Company's undertaking, as excerpted in Exhibit A of plaintiff's amended complaint, is co-extensive with the area of operation of, and of the liability

of the named insured for damages resulting from the negligent operation of any such insured responsible for the operation of such vehicle.

III.

That plaintiff is entitled to judgment against defendant, Royal Indemnity Company, a New York corporation, in the sum of \$20,000.00 together with interest at the rate of 7% from September 12, 1946, to date of entry of judgment herein, together with plaintiff's allowed costs of suit in the sum of \$14.00 in the civil action for damages in the Superior Court.

IV.

That plaintiff is entitled to his costs and disbursements incurred or expended herein.

Judgment is hereby ordered to be entered accordingly.

Dated: 4/27/50.

/s/ JAMES M. CARTER.

The foregoing is approved as to form.

..... [106]

Receipt of Copy acknowledged.

[Endorsed]: Filed April 27, 1950. [107]

District Court of the United States, Southern
District of California, Central Division

No. 8729 C

GEORGE N. OLMSTEAD,

Plaintiff,

vs.

ROYAL INDEMNITY COMPANY, a Corporation;
DOE COMPANY, a Corporation; ROE COM-
PANY, a Corporation,

Defendants.

JUDGMENT

A motion having regularly been made by the plaintiff above named, and the above cause coming on to be heard on said motion of plaintiff for summary judgment upon his amended complaint for the relief demanded in said amended complaint under Rule 56 of the Federal Rules of Civil Procedure that there is no genuine issue as to any material fact, the affidavits in support thereof, the answers to plaintiff's request for admissions, the answers to plaintiff's interrogatories, with due proof of service of said notice of motion and affidavits in support of the said motion, and after argument had in open court, it is,

Ordered, Adjudged and Decreed that said motion for summary judgment be and the same is granted; that plaintiff do have and recover from the defendant, Royal Indemnity Company, a corporation, the sum of \$20,014.00 with interest thereon at 7%

per annum from [108] the 12th day of September, 1946, to the date hereof, in the sum of \$5,075.04, making a total sum of \$25,089.04, and costs of this action to be taxed by the clerk against defendant, Royal Indemnity Company, a corporation, for which plaintiff shall have execution.

/s/ JAMES M. CARTER.

Enter: 4/27/50.

Approved as to form.

.....
Judgment entered Apr. 27, 1950.

Docketed Apr. 27, 1950, Book 65, Page 465.

Set aside by judgment filed and entered June 6, 1950, in judgment book 66, page 690.

EDMUND L. SMITH,
Clerk U. S. District Court.

By /s/ C. A. SIMMONS,
Deputy Clerk. [109]

Memorandum (Rule 7(h) Local Rules
Southern District of California)

7% on \$20,000.00 amounts to \$1,400.00 per year or \$116.67 per month, or \$3.89 per day, or from September 12, 1946, to April 12, 1950, a period of three years seven months or \$5,016.69 to April 12, 1950, and at the daily rate thereafter of \$3.89 until the entry of this judgment.

Receipt of Copy acknowledged.

[Endorsed]: Filed April 27, 1950. [110]

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL AND TO SET
ASIDE JUDGMENT AND BRIEF IN SUP-
PORT THEREOF

Comes Now the defendant Royal Indemnity Company, a corporation, by its attorney below named, and moves the Court to grant a rehearing on the Motion for Summary Judgment made by plaintiff in the above action and to set aside judgment and as grounds therefor states as follows:

1. Newly discovered evidence material for this defendant which it could not with reasonable and due diligence have discovered and produced at the hearing of the Motion for Summary Judgment.

2. The prior judgment rendered by the Superior Court of the State of California in and for the County of Los Angeles in action number 516890, and upon which the above-entitled action is based, is void and it is inequitable that the said judgment should have prospective application.

3. It was error for the Court to grant plaintiff's Motion [112] for Summary Judgment for the reason that:

(a) The record and all the pleadings and papers on file herein show that there are genuine issues as to several material facts.

(b) The plaintiff was not entitled to judgment as a matter of law.

4. It was error for the court to make the following findings of fact:

(a) "That it is true that said ordinance was by its terms declaratory of public policy that pedestrians or any other person who may be injured as a result of a you-drive business venture putting a dangerous instrumentality such as an automobile into the possession of an irresponsible driver, be protected against otherwise uncompensated damage resulting from negligent operation or use thereof by any person responsible for such operation." (Finding No. IV.)

This finding was error for the reason that the ordinance speaks for itself and it makes no reference to irresponsible drivers and furthermore there was no evidence whatsoever that the City of Pasadena enacted this ordinance for this reason, or for any reason other than that specified in the ordinance to wit: To regulate the operation of drive yourself vehicles upon the public streets of Pasadena.

(b) "That it is true that said agreement, Exhibit A, was a required and compulsory undertaking pursuant to said ordinance of the City of Pasadena." (Finding VII.)

This finding was error for the reason that there was no evidence introduced to show that the City of Pasadena intended to extend the effect of its ordinance beyond its city limits, or that it intended to protect citizens of other communities or that it had the right to project the effect of its ordinance beyond its limits into the jurisdiction of another governmental [113] unit.

(c) "That it is true that on April 9, 1946, said Packard automobile while being driven by the said Sam Richardson, with the permission and consent of the named insureds, was involved in a collision accident with plaintiff herein in the 1200 block, South San Gabriel Boulevard." (Finding XIII.)

This finding was error for the reason that there was no evidence of permission and/or consent given by the named insureds to the said Sam G. Richardson to drive or use the vehicle as it was being used on the evening in question. In fact, the answer and all other papers on file in this action show that defendant specifically denied that there was permission and/or consent.

(d) "That it is true that plaintiff in said collision accident at said time and place sustained bodily injuries and property damage." (Finding XVI.)

This finding was error for the reason that there was no evidence showing property damage and in fact the complaint filed by plaintiff in the Los Angeles Superior Court case number 516890, which is the basis of the above-entitled action, was for damages to person and was so captioned.

(e) "That it is true that the said Sam Richardson, receiving possession of said Packard automobile on April 7, 1946, under a rental agreement with the named insureds was the driver of said vehicle on April 9, 1946, at the time of the aforesaid collision accident with plaintiff, and was also the Sam Richardson who was named a defendant in a civil suit in Superior Court of the State of California

n and for the County of Los Angeles, wherein plaintiff herein took judgment against Sam Richardson on account of bodily personal injuries in the sum of \$25,000.00 and on account of property damage in the sum of \$6,000.00 on the 12th day of September, 1946." (Finding XVII.) [114]

This finding was error for the reason that there was no evidence introduced to show that plaintiff was awarded any amount for damages to property.

(f) "That it is true that defendant, Royal Indemnity Company, a New York corporation, had on or about June 12, 1946, actual notice of said collision accident and of the time, place and circumstances thereof, and that plaintiff herein then claimed personal injuries and property damage, and that plaintiff herein had filed a civil suit in negligence for damages against the said Sam Richardson and the named insureds as the result of negligence on the part of Sam Richardson in his operation of said Packard vehicle during the rental period for which the named insureds had consented to his use and given possession of said Packard vehicle." (Finding XVIII.)

This finding was error for the reason that there was no evidence introduced showing, or tending to show, that this defendant had any notice other than that received from Roy Jordan which was based on the complaint served on him in the Los Angeles Superior Court case number 516890, attached hereto as Exhibit "X."

(g) "That it is true that plaintiff's judgment and all thereof against Sam Richardson, also known

as Sam G. Richardson, was and is unpaid, and that interest at 7% on said judgment from September 12, 1946, and all thereof, was and is unpaid, together with plaintiff's allowed costs of suit in said Superior Court action in the sum of \$14.00." (Finding XX.)

This finding was in error for the reason that this defendant denied on information and belief such an allegation contained in paragraph XV of plaintiff's amended complaint, and furthermore the court had knowledge that plaintiff was paid \$3500.00 in complete satisfaction of record in action number 516890 (See Request #12 of Plaintiff's Request for Admissions and answer #12 of Defendant's Answers to Request for Admissions). [115]

(h) "That it is true that subsequent to April 9, 1946, defendant, Royal Indemnity Company, a New York corporation, was not prejudiced in any wise in their defense of liability under Exhibit A except that a judgment for personal injuries and property damage was taken by plaintiff against this defendant's additional insured, Sam G. Richardson." (Finding XXIV.)

This finding was error for the same reason assigned to finding number XVII.

(i) "That it is true that defendant, Royal Indemnity Company, a New York corporation, having actual knowledge of the pendency of this plaintiff's claims, had the opportunity to defend its additional insured, Sam G. Richardson, in said damage suits." (Finding XXV.)

This finding was error for the reason that there

was no evidence introduced to this effect and the argument made by plaintiff is not evidence. Furthermore it would have been contrary to all legal and ethical practices for this defendant to enter a general appearance for Sam G. Richardson who had not requested defense or representation, since it would have exposed him to liability without his consent. In any event, the newly discovered evidence referred to herein conclusively shows that there was no service of summons or complaint upon the said Sam G. Richardson in the said case.

(j) "That it is true that defendant, Royal Indemnity Company, a New York corporation, in its defense of Harry E. Blodgett in connection with this plaintiff's Superior Court action for civil damages, in a verified answer for said named insured of June 27, 1946, admitted that the Packard vehicle was being used and operated by Sam G. Richardson at the time and place of the aforesaid collision accident with the permission, consent and acquiescence of the named insured." (Finding XXVIII.)

This finding was error for the reason that there was [116] no evidence introduced to this effect and this defendant has positively and unqualifiedly denied that there was such permission and/or consent.

(k) "That it is true that plaintiff's judgment against Sam G. Richardson in the prior civil action for damages in the Superior Court has not been satisfied in whole or in part." (Finding XXIX.)

This finding was error for the same reason assigned to finding number XX.

(1) "That it is common knowledge that automo-

biles rented in 1946 in the City of Pasadena are not necessarily intended to be entirely confined, as to their operations, to the municipal limits or physical boundaries of the City of Pasadena.” (Finding XXXII.)

This finding was error for the reason that there was no evidence introduced to this effect and this observation was not within the issues since the question was: Did the parties to the insurance contract intend that the coverage beyond the jurisdiction of the City of Pasadena and its ordinance be compulsory or voluntary?

5. It was error for the Court to award judgment to plaintiff in the sum of \$20,014.00 for the following reasons:

(a) The contract of insurance which is attached to plaintiff’s complaint and marked Exhibit “A” and which is purportedly one of the bases of this action limits the liability of this defendant to \$15,000.00 for personal injuries.

(b) The ordinance relied upon by plaintiff does not require insurance for property damage but requires insurance only for injuries to person.

(c) Plaintiff’s complaint in Los Angeles Superior Court number 516890, which is the basis of the above-entitled action, is “a complaint for damages to person” and makes no [117] allegations concerning damage to property.

(d) Coverage “B” on page 2 of Exhibit “A” attached to plaintiff’s complaint shows that property damage, as used by the parties, referred to “dam-

ages because of injury to or destruction of property, . . .”..

(e) Special damages arising out of personal injuries are not damages to property.

(f) There has been complete and full satisfaction of record in Los Angeles Superior Court action number 516890 by reason of defendant's payment to plaintiff of the sum of \$3500.00. In any event defendant must receive credit for this sum, which should be deducted from the maximum policy limits of \$15,000.00 for personal injuries. If there is any liability on the part of this defendant to plaintiff it cannot exceed \$11,500.00.

6. For such other and further reasons as may be presented at the hearing on this motion.

The motion shall be heard upon the pleadings and papers, the minutes of the court, copy of the complaint in case number 516890, the memorandum of points and authorities filed herewith, and upon the affidavits of George E. Hosey, Sam G. Richardson, Elizabeth E. Richardson, Hulen C. Callaway, Robert E. Dunne, and R. W. Clayton.

Dated: May 4th, 1950.

TRIPP & CALLAWAY,

By /s/ HULEN C. CALLAWAY,

Attorneys for Defendant.

To Plaintiff and Paul DuBois His Attorney:

Please Take Notice That the undersigned will bring the above motion on for hearing before this Court at the courtroom of the Honorable James M. Carter, in the United States Courthouse in the City of Los Angeles on May 15, 1950, at 10:00 a.m., or as [118] soon thereafter as counsel can be heard.

TRIPP & CALLAWAY,

By /s/ HULEN C. CALLAWAY,

Attorneys for Defendant. [119]

[Title of District Court and Cause.]

AFFIDAVIT OF SAM G. RICHARDSON

State of California,

County of Sacramento—ss.

Sam G. Richardson, being duly sworn, deposes and says:

That he was involved in an accident on April 9, 1946, when the automobile which he was driving collided with a pedestrian in the vicinity of the 1200 block of San Gabriel Boulevard in the County of Los Angeles; that at said time and for several months subsequent thereto affiant operated a garage and service station at 836 South San Gabriel Boulevard, San Gabriel, California; that on or about the middle of June, 1946, affiant was informed by (name not recalled), a mechanic who at that time was working at the affiant's garage on a commission

basis, that a certain summons and complaint had been left with him during affiant's absence from the garage; that affiant filed no pleading in the said action; that several weeks subsequent thereto and on or about the 21st or 22d [124] day of July, 1946, affiant departed from the State of California and went to Fort Worth, Texas, where he visited his mother and friends and also obtained certain automobile accessories including tires, batteries and spotlights for sale at his garage in San Gabriel; that he remained in Texas for a period of four or five weeks; that at no time during the month of August, 1946, was affiant in the State of California or in the environs of San Gabriel; that at no time was affiant ever served with a summons or complaint or any papers in any action instituted by George N. Olmstead; that during the last ten or fifteen years affiant has never grown or worn a mustache, that affiant, in the year 1946 was 5 feet 9 inches in height, weighed 175 pounds and had straight hair the color of which is light brown sprinkled with grey, with grey hair at the temples; that affiant never at any time conducted a business at 804 South San Gabriel Boulevard, San Gabriel, California; that affiant states absolutely and positively that he at no time was ever served with any papers in any lawsuit involving one George N. Olmstead, or Alford P. Olmstead, or any

other person who may have been involved in the aforesaid collision of April 9, 1946.

/s/ SAM G. RICHARDSON.

Subscribed and sworn to before me this 10th day of April, 1950.

[Seal] /s/ C. R. BARTELLS,
Notary Public in and for
Said County and State.

My commission expires May 28, 1952. [125]

[Title of District Court and Cause.]

AFFIDAVIT OF GEORGE E. HOSEY

State of Texas,
County of Tarrant—ss.

George E. Hosey, being first duly sworn, deposes and says:

That he has resided at Ft. Worth, Texas, for 48 years;

That he is personally acquainted with Sam G. Richardson and his mother, Mrs. Elizabeth E. Richardson, of 3507 Ada Street, Ft. Worth, Texas;

That in the latter part of July, 1946, the said Sam G. Richardson came to Ft. Worth, Texas; that he saw the said Sam G. Richardson daily from the latter part of July through the latter part of August, 1946; that he knows of his own knowledge that [126]

Sam G. Richardson was in Ft. Worth, Texas, on August 3rd, 1946.

/s/ GEORGE E. HOSEY.

Subscribed and sworn to before me this 20th day of April, 1950.

[Seal] /s/ GARRETT MIDDLEHOOF,
Notary Public in and for
Said County and State. [127]

[Title of District Court and Cause.]

AFFIDAVIT OF
ELIZABETH E. RICHARDSON

State of Texas,
County of Tarrant—ss.

Elizabeth E. Richardson, being first duly sworn, deposes and says:

That she is the mother of Sam G. Richardson who formerly resided and conducted a business at 836 South San Gabriel Boulevard, San Gabriel, California; that she has lived in Ft. Worth, Texas, continuously for the last 18 years;

That in the latter part of July, 1946, her son, the aforesaid Sam G. Richardson, came to Ft. Worth, Texas, to visit her and to purchase certain automobile accessories for use and sale at his place of business in San Gabriel, California; that the said Sam G. Richardson remained in Ft. Worth, Texas, continuously from the latter part of July as aforesaid through to the latter part of August,

1946; that on August 3rd, 1946, the said Sam G. Richardson [128] was in Ft. Worth, Texas.

/s/ ELIZABETH E. RICHARDSON.

Subscribed and sworn to before me this 15th day of April, 1950.

[Seal] /s/ GEO. E. HOSEY,
Notary Public in and for
Said County and State. [129]

[Title of District Court and Cause.]

AFFIDAVIT OF ROBERT E. DUNNE

State of California,
County of Los Angeles—ss.

Robert E. Dunne, being duly sworn, deposes and says:

That he is an attorney at law duly licensed to practice in the State of California; that he is one of the attorneys for defendant in the above-entitled case; that on the 10th day of April, 1950, at Folsom Prison, Reprisa, California, affiant, interviewed one Sam G. Richardson, inmate Number A-8152; that at said time and place the said Sam G. Richardson informed affiant that he had been incarcerated in prison since January, 1948; that he further informed affiant that his mother, Elizabeth E. Richardson, resided at 3507 Ada Street, Fort Worth, Texas, and that she and her neighbors could testify that the said Sam G. Richardson was in Fort Worth, Texas, on August 3, 1946; affiant further states that

the said Sam G. [130] Richardson has light brown hair streaked with gray and is gray at the temples.

/s/ ROBERT E. DUNNE.

Subscribed and sworn to before me this 3rd day of May, 1950.

[Seal] /s/ ELIZABETH P. WILLIAMS.

Notary Public in and for
Said County and State. [131]

[Title of District Court and Cause.]

AFFIDAVIT OF HULEN C. CALLAWAY

State of California,
County of Los Angeles—ss.

Hulen C. Callaway, being first duly sworn, deposes and says:

That he is and has been one of the attorneys of record in the above-entitled case since it was filed and actively in charge of the defense of said case; that in connection with garnering the facts preparatory to filing the necessary pleadings in the defense of said case, this affiant endeavored to contact one Sam G. Richardson for the purpose of eliciting information necessary for the proper defense of the aforesaid action; that within a few days after the complaint was delivered to affiant's office he instructed one Frank E. Arnett, an investigator at that time regularly used by affiant for the purpose of interviewing witnesses and investi-

gagting law suits, to contact said Sam G. Richardson [132] for the purpose of obtaining certain information from him; that the affiant instructed Frank Arnett to immediately commence said investigation and instructed him to go to 836 South San Gabriel Boulevard, Los Angeles County, California, which was the business and home address given by said Sam G. Richardson to Blodgett Auto Service and if Sam G. Richardson could not be located there to make a neighborhood canvas to see if any of the neighbors knew said Sam Richardson's whereabouts; said Frank Arnett reported to affiant that said Sam Richardson was not found at the said address; that he made inquiry in and about the vicinity of said address and was unable to locate anyone who knew the whereabouts of Mr. Richardson; that thereafter Mr. Arnett was instructed to check the list of voters in Los Angeles County in order to ascertain any new address that the said Sam Richardson might have had. That the check of said list of voters was fruitless; that said Frank E. Arnett reported that he returned to said address on San Gabriel Boulevard and its vicinity several times and every time he was unable to find said Richardson or anyone who could give him a lead as to where he might be found. That an affidavit cannot be made by the said Frank E. Arnett for the reason that he died on February 8, 1950.

That thereafter affiant instructed one R. W. Clayton, a salaried investigator of the Royal Indemnity Company, to make other and further efforts to

find Sam G. Richardson or any of his relatives; that subsequently thereto R. W. Clayton reported that he had located Sam G. Richardson's brother and that he called upon the said brother twice; that on the first call the said brother was unable to give him Sam G. Richardson's exact whereabouts and asked him to return again; that upon returning the said R. W. Clayton was literally chased off the premises by Ed Richardson, as will more fully appear in R. W. Clayton's affidavit.

That after all efforts to locate said Sam G. Richardson had [133] been exhausted without success your affiant caused letters to be sent to the various penal institutions in the State of California inquiring whether Sam G. Richardson was an inmate of any of said institutions; that on or about the 15th day of March, 1950, a letter was received from Robert A. Heinze, Warden of the California State Prison at Folsom, stating that Sam Richardson was an inmate of said institution, a copy of which letter is attached hereto and hereby made a part hereof.

That affiant, as soon as it could expeditiously be accomplished without conflict with the trial calendar of affiant's office, dispatched Robert E. Dunne, one of the attorneys of affiant's law firm, to the California State Prison at Folsom to interview said witness, as will more fully appear from the affidavit of said Robert E. Dunne.

That in addition thereto affiant had made inquiry of the employees of the Blodgett Auto Service, the Sheriff's Office in Pasadena and other places too

numerous to mention, in an effort to locate said Sam Richardson, without success.

That the interview with Sam Richardson resulted in indicating that he had never been served with summons and complaint in Superior Court case number 516890, as will more fully appear by said Sam G. Richardson's affidavit; that in fact the affidavits of Sam G. Richardson, his mother Elizabeth E. Richardson and George Hosey show that the said Sam G. Richardson was in Fort Worth, Texas, on August 3, 1946, the date which he was purportedly served.

That the fact that no legal service had been had on said Sam G. Richardson has been discovered on April 10, 1950, and subsequent to the hearing of plaintiff's motion for summary judgment on April 3, 1950.

Affiant further states that the said evidence as set forth in said affidavits is material in its object and on another trial or hearing ought to produce an opposite result to that of a [134] summary judgment being entered against defendant herein, and that said evidence is not cumulative, corroborative or collateral.

/s/ HULEN C. CALLAWAY.

Subscribed and sworn to before me this 4th day of May, 1950.

[Seal] /s/ ELIZABETH P. WILLIAMS,
Notary Public in and for
Said County and State. [135]

(Copy)

State of California
Department of Corrections
California State Prison at Folsom
Represa, California
Robert A. Heinze, Warden

March 14, 1950

Please Refer to Richardson, Sam

File No. A-8152

Mr. W. H. Radermacher
Attorney at Law
210 West Seventh Street
Los Angeles 14, California

Dear Sir:

This will acknowledge your letter of March 9, regarding Sam Richardson, A-8152, an inmate of this institution, who is a witness of the case of Olmstead vs. Royal.

Subject is presently confined in this institution and you may interview him if you wish to do so. The most convenient time for interview would be on any week day, Monday through Friday, between the hours of 9 a.m. and 3 p.m. You may present this letter to the officer at the entrance gate and arrangements will be made to accommodate you.

/s/ ROBERT A. HEINZE,
Warden.

RAH:KT/b

[Title of District Court and Cause.]

AFFIDAVIT OF R. W. CLAYTON

State of California,

County of Los Angeles—ss.

R. W. Clayton, being first duly sworn, deposes and says: That he is an employee of the Royal Indemnity Company; that some of his duties are to investigate the facts and circumstances of certain assigned law suits and to contact and interview witnesses involved in the same; that on or about the 2nd day of March, 1950, affiant undertook to search for Sam G. Richardson pursuant to instructions received from the law firm of Tripp & Callaway prior to the aforesaid date; that affiant made phone calls to various people, including the Los Angeles County Sheriff's Office in El Monte; that he was unsuccessful in locating the said Sam Richardson or any of his relatives; that he then proceeded to 836 South San Gabriel Boulevard and was unable to find said Sam G. Richardson at that address; the address at 836 South San Gabriel was a vacant [137] service station and garage with a living quarters attached; affiant made inquiry in the neighborhood of this gas station and confirmed that Sam G. Richardson had conducted business at that gas station in the past; information obtained in a canvas of the area revealed that his brother Ed Richardson worked in the Puente area; that the address where the said Ed Richardson might be located in Puente is not now recalled by affiant; that affiant proceeded to Puente and was informed at the said address that Ed Richardson had worked there but had left to go into

business of his own, operating a gas station, which it was believed was located at South Rosemead and Mission in Rosemead, California; that affiant immediately proceeded to the said address and there contacted a man who identified himself as Ed Richardson, brother of the aforesaid Sam G. Richardson; that Ed Richardson advised that he could not give the actual whereabouts of Sam G. Richardson but indicated that he was in a penal institution somewhere in the State of California but he did not know whether it was a city, county or state institution; that affiant further inquired from the said Ed Richardson as to former employees of the said Sam G. Richardson who might know of the said Richardson's present whereabouts; that affiant was informed that the said Ed Richardson could not presently recall the names of any of the said employees but that if he could be given 24 hours he might be able to locate some of the former employees or their names; that affiant returned to see Ed Richardson two days later; that upon recognizing affiant Ed Richardson ordered him off the premises and further ordered him never to return; affiant inquired as to why there was such a sudden change in his attitude since affiant had returned at the invitation of the said Ed Richardson and he was informed by the said Ed Richardson he had been thinking it over and he didn't want to become involved in anything pertaining to his brother; that from time to time during this two day period affiant reported the [138] progress of his investigation to the law firm of Tripp & Callaway and after being ordered off the premises of Ed Richardson by that person

affiant recommended to the aforesaid attorneys that a search of the penal institutions throughout the state should be made for the purpose of finding Sam G. Richardson.

/s/ R. W. CLAYTON.

Subscribed and sworn to before me this 4th day of May, 1950.

[Seal] /s/ ELIZABETH P. WILLIAMS,
Notary Public in and for
Said County and State.

Exhibit X

In the Superior Court of the State of California in
and for the County of Los Angeles

No. 516890

GEORGE N. OLMSTEAD, by Alford P. Olmstead,
his Guardian ad Litem,

Plaintiff,

vs.

SAM G. RICHARDSON, ROY JORDAN, Individually, as Executor of the Estate of Harry E. Blodgett, Deceased, and as Trustee under the Last Will and Testament of Harry E. Blodgett, Deceased, JOHN DOE, DOE COMPANY, a corporation, and DOE AND ROE, a co-partnership,

Defendants.

COMPLAINT FOR DAMAGES TO PERSON

Comes now the plaintiff and for cause of action against the defendants alleges:

I.

That plaintiff, George N. Olmstead, is an incompetent person; that on the 16th day of July, 1946, on application duly made, Alford P. Olmstead, the brother of plaintiff, was duly appointed by the above Court the Guardian Ad Litem of said George N. Olmstead for the purposes of this action.

II.

That the names John Doe, Doe Company, a corporation, and Doe & Roe, a co-partnership, are the fictitious names of defendants, whose true names are to this plaintiff unknown, and plaintiff [140] asks that when such true names are discovered, this complaint may be amended by inserting said true names in the place of and stead of said fictitious names.

III.

That at all times mentioned herein plaintiff was and still is a resident of the County of Los Angeles, State of California.

IV.

That at all times mentioned herein, South San Gabriel Boulevard was and now is a public highway of the County of Los Angeles, State of California; that said South San Gabriel Boulevard runs in a northerly and southerly direction; that the 1200 block of said San Gabriel Boulevard is a residence district.

V.

That on or about the 9th day of April, 1946, at or about the hour of 2:50 a.m. of said day, plaintiff was walking in a careful and prudent manner in a northerly direction along and upon said South San Gabriel Boulevard at or about the 1200 block; that at said time and place defendant, Sam G. Richardson, having the charge, management and control of a certain 1940 Packard automobile, bearing license number 10L343, negligently, carelessly, recklessly and unlawfully drove and operated said automobile in a northerly direction along and upon said South San Gabriel Boulevard, without due regard to the safety and convenience of pedestrians along and upon said highway, and particularly of this plaintiff, so that said automobile struck, and ran into, upon and over plaintiff with great force and violence, and thereby knocked him down and caused him to strike the pavement; that as a direct and proximate result of the careless, recklessness, negligence and unlawful acts of said defendant, Sam G. Richardson, as aforesaid, plaintiff was broken, bruised and injured about the body, head and extremities, and more in particular received fractures of the head, lacerations of the [141] head and scalp, bruises and scratches about the body, paralysis of the left arm, inner disturbances of the body, injury to the brain, loss of memory, loss of consciousness, contusions, concussion, mental aberrations, shock, pain, anguish, anxiety, nervousness, and other injuries which at this time cannot be fully ascertained, and plaintiff further believes and therefore alleges

there never will be a full recovery, all to his damage in the sum of Seventy-five Thousand Dollars (\$75,000.00).

VI.

That by reason of said injuries and premises as aforesaid, plaintiff was required to engage the services of a physician and surgeon to treat, perform surgery, supply medicines, anesthetics and X-rays, and was further caused to engage nursing, sanitarium, and other attendant services, and hospitalization for his care, all to his damage in the sum of \$3,698.10; that plaintiff has become obliged to pay for the aforesaid and will be obliged to pay for additional similar services and treatment in the future, the exact amount of which is unknown at this time; that plaintiff will ask leave of this Court to amend his Complaint when the exact amount of said additional obligations are ascertained and insert herein the amount so ascertained.

VII.

That by reason of said inquiries and premises as aforesaid, plaintiff was unable and will be unable for an indefinite period to work in any employment and/or engage in any business activity, and therefore has lost earnings which plaintiff is informed and believes and on that ground alleges at or about the rate of \$300.00 per month, all to his damage as of this date in or about the sum of \$1,000.00, and will lose future earnings at said rate, the exact total amount of which is unknown at this time; that plaintiff will ask leave of this Court to amend his

complaint when the exact amount of said future earnings is ascertained and insert herein [142] the amount so ascertained.

VIII.

That by reason of said inquiries and premises as 15th day of February, 1946, in the County of Los Angeles, State of California; that on or about the 21st day of February, 1946, by an Order duly given, made and entered in the above-entitled Court, defendant Roy Jordan was appointed Special Administrator of the Estate of said Harry E. Blodgett, Deceased, and on said day was duly qualified as such Special Administrator, and Special Letters of Administration of said estate were thereupon issued to him out of said Court; that on or about the 18th day of March, 1946, by an Order duly given, made, and entered in the above-entitled Court, defendant Roy Jordan was appointed Executor of said estate of Harry E. Blodgett, Deceased, and thereafter, on or about the 20th day of March, 1946, he duly qualified as such Executor and Letters Testamentary of said estate were thereupon issued to him out of said Court, and he has ever since been, and now is, the duly qualified and acting Executor of the said estate of Harry E. Blodgett, Deceased.

IX.

That defendant Roy Jordan was at all times mentioned herein, and now is, the Trustee of a trust estate created under the Last Will and Testament of said Harry E. Blodgett, Deceased, now in probate in the above-entitled Court, which defendant Roy

Jordan was, and now is, the Executor thereof as set forth in paragraph VIII above.

X.

That defendant Roy Jordan at all times mentioned herein had authority to continue and conduct the business of said deceased at the risk of said estate and/or said trust by virtue of Orders of the above-entitled Court as said Special Administrator and/or as said Executor, as Trustee under said Trust, as said Executor as authorized under said will, and implied by law or equity. [143]

XI.

That part of the business and assets of said estate and said Trust was said 1940 Packard automobile referred to herein, which said estate, and/or said trust was at all times mentioned herein the owner or owners thereof.

XII.

That said 1940 Packard automobile was used and operated by defendant Sam G. Richardson at the time and place mentioned herein with the permission, consent and acquiescence of defendant Roy Jordan individually, as said Executor, and/or as Special Administrator of said estate, and as said Trustee.

XIII.

That plaintiff is informed and believes, and on that ground alleges: that at all times mentioned herein defendant Sam G. Richardson was driving

and operating said automobile as the agent, employee and/or servant, and doing so within the course of his employment and/or agency for the defendant individually, as said Executor and/or Special Administrator of said estate, and as said Trustee.

Wherefore, Plaintiff demands judgment against the defendants and each of them, as follows:

1. General damages in the sum of \$75,000.00.
2. Special damages for medical services, etc. as alleged herein in the sum of \$3,698.10, and for loss of earnings as alleged herein in the sum of \$1,000.00.
3. Special damages as may be found further due under the allegations and proof herein for medical services, etc. and loss of earnings at the time of the trial hereof.
4. For costs of suit incurred and to be incurred herein.
5. For such other relief as the Court may deem meet and just in the premises.

HOWARD C. VELPMEN &
JOHN N. HURTT,

By HOWARD, C. VELPMEN,
Attorneys for Plaintiff.

Receipt of Copy acknowledged.

[Endorsed]: Filed May 5, 1950. [144]

[Title of District Court and Cause.]

STATEMENT OF REASONS IN OPPOSITION
TO MOTION

(Rule 3d, Local Rules
Southern District, California)

Plaintiff opposes defendant's motions in entirety on the grounds that the issues raised are: (1) admitted by pleadings; (2) not contrary to law; (3) laches; (4) estoppel; (5) improper forum; (6) improper moving party; (7) Section 473a C.C.P.; (8) insufficient application and showing; (9) judgment valid on its face; (10) defendant not free from fault; (11) collateral attack is improper; and (12) findings were settled according to rules.

Respectfully submitted,

Dated this 10th day of May, 1950.

/s/ C. PAUL DuBOIS,
Attorney for Plaintiff. [146]

COUNTER-AFFIDAVIT OF C. PAUL DuBOIS

State of California,
County of Los Angeles—ss.

C. Paul DuBois, being duly sworn, deposes and says:

That affiant has been personally familiar with prosecuting of this plaintiff's claims arising out of his injuries since their occurrence on April 9, 1946.

That on or about June 7, 1946, this plaintiff

caused to be filed in the Superior Court of the State of California in and for the County of Los Angeles his action for personal injuries and damages sustained as a result of the casualty above referred to, and that said action was numbered 515192 and included as defendants: "Sam G. Richardson, Harry E. Blodgett, John Doe, Doe Company, a corporation, and Doe and Roe, a co-partnership." That shortly thereafter an answer on behalf of Roy Jordan as executor of the Estate of Harry E. Blodgett, deceased, was filed by the law firm of Tripp, Callaway, Sampson and Dryden wherein the verification by Roy Jordan is dated June 27, 1946. That affiant is informed and believes and thereupon alleges that said counsel for said defendant were acting for and on behalf of Royal Indemnity Company in affording said defense.

On July 16, 1946, plaintiff herein caused to be executed and filed a dismissal without prejudice in said Superior Court Action.

That on July 18, 1946, plaintiff herein caused to be filed in the Superior Court of the State of California, in and for the County of Los Angeles, an action for the same damage resulting from the same casualty against: "Sam G. Richardson, Roy Jordan, individually, as executor of the Estate of Harry E. Blodgett, deceased, and as trustee under the Last Will and Testament of Harry E. Blodgett, Deceased, John Doe Company, a corporation, and Doe and Roe, a co-partnership," with said case being numbered 516890. [169] That affiant refers to a certified photostatic copy of the records of said case annexed

hereto as "Exhibit 1" and incorporated by this reference at this point as though set out in full. That said exhibit is the original summons and return of service by the sheriff's office in said suit. That thereafter the law firm, Tripp, Callaway, Sampson and Dryden, filed an answer in said action on behalf of Roy Jordan, executor of the estate of Harry E. Blodgett, deceased, and as testamentary trustee under the Last Will and Testament of Harry E. Blodgett, deceased, and the verification of said Roy Jordan upon said answer is dated July 29, 1946. That affiant is informed and believes and thereupon alleges that said law firm represented Royal Indemnity Company in affording defense to the said Roy Jordan. That on August 14, 1946, plaintiff served and filed his Memorandum for Setting for Trial in Superior Court action No. 516890 serving a copy thereof on Tripp, Callaway, Sampson and Dryden. That on September 3, 1946, plaintiff herein caused to be served and filed upon Tripp, Callaway, Sampson and Dryden Notice of Trial in action 516890 wherein the Superior Court had set for trial the said case for the 17th of April, 1947, at 9:15 a.m. in the Department of the Presiding Judge. That on September 5, 1946, plaintiff herein caused to be filed an affidavit re: Military Service in Superior Court case No. 516890 and pertaining to Sam G. Richardson. That on September 12, 1946, A. E. Paonessa, as Judge of the Superior Court in Superior Court action No. 516890, signed Findings of Fact and Conclusions of Law in disposition of said case against Sam G. Richardson, and on said date

also signed, filed and entered judgment against the said Sam G. Richardson.

That on September 18, 1946, plaintiff caused to be recorded in the Office of the Recorder of Los Angeles County an abstract of judgment. That annexed hereto as "Exhibit 2" is a photostatic copy of said abstract of judgment and affiant refers [170] to said exhibit by this reference and incorporates the same at this point as though set out in full.

That on February 7, 1947, the California State Department of Motor Vehicles issued and sent registered mail to Sam G. Richardson the order of said department suspending the driver's license of said Sam G. Richardson. That affiant refers to "Exhibit 3" annexed hereto as a photostatic copy of said Order of Suspension.

That affiant has examined the records of the sheriff of the County of Los Angeles which records are original long-hand entries and show that on February 19, 1947, George M. Bankstone, deputy sheriff of said county, did, pursuant to plaintiff's request of February 17, 1947, levy upon all real and personal property of Sam Richardson at 836 South San Gabriel Boulevard pursuant to a Writ of Execution issued by said Superior Court in case No. 516890, and that the said sheriff put a keeper named Blaney in possession of the premises located at 836 South San Gabriel Boulevard pursuant to said Writ of Execution, and that said keeper remained in daily continuous occupation thereafter over said premises until October 1, 1947, at which time the personal property therein situated were transferred

to storage by the sheriff and that said personal property still remains in storage under the writ of attachment hereinabove referred to. That the sheriff's records also indicate that on January 19, 1946, Sam Richardson leased Lots 65, 66, 67 and 68 of Block 101 of the East San Gabriel Tract being the premises at 836 South San Gabriel Boulevard, from Hayao Yoshinura as guardian of Raymond Yoshinura for a five year term to and expiring on December 31, 1950, with said lease being recorded February 18, 1947; that thereafter Sam Richardson and Mable M. Richardson, his wife, sub-leased the said real property to Seaside Oil Company with the said property to be used as a service station. [171]

That on March 22, 1947, Hulen C. Callaway for Tripp, Callaway, Sampson and Dryden took the deposition of plaintiff herein and Alfred P. Olmstead and thereafter said deposition was duly transcribed and served.

That on April 22, 1947, plaintiff's counsel and Hulen C. Callaway for Tripp, Callaway, Sampson and Dryden signed a written stipulation and approval of a form of judgment stipulated by said counsel in open court wherein plaintiff took judgment against Roy Jordan, executor of the Estate of Harry E. Blodgett, deceased, and as Testamentary Trustee under the Last Will and Testament of Harry E. Blodgett, deceased, wherein it is provided:

“Upon the receipt of said sum to plaintiff, his guardian ad litem and plaintiff's attorney are authorized to execute a satisfaction of *said judgment* (italics our) and the clerk is ordered

to enter this judgment accordingly and to enter a satisfaction thereof when so executed.”

That on April 23, 1947, plaintiff caused to be executed and filed a satisfaction of judgment wherein the judgment of April 22, 1947, is identified and which provides:

“The judgment having been paid, full satisfaction is hereby acknowledged . . . in favor of plaintiff and against defendant, Roy Jordan, executor for the Estate of Harry E. Blodgett, deceased, and as testamentary trustee under the Last Will and Testament of Harry E. Blodgett, deceased, and the clerk is hereby authorized and directed to enter full satisfaction of record in said action.”

That on April 21, 1947, plaintiff’s counsel addressed a letter to Hulen C. Callaway and Tripp, Callaway, Sampson and Dryden wherein it is provided in part:

“It is my understanding with you that defendant Roy Jordan waives all right of subrogation against defendant Sam G. Richardson and farther a satisfaction of judgment against Roy Jordan [172] will not satisfy the judgment against Sam G. Richardson.”

That thereafter plaintiff’s counsel received a letter from Hulen C. Callaway for Tripp, Callaway, Sampson and Dryden dated April 25, 1947, wherein it is said:

“Pursuant to your suggestion, this is to ad-

of my sight during the necessary time it took to
vise that although the draft of the Royal Indemnity Company payable to George N. Olmstead and Alford P. Olmstead, his guardian ad litem, and H. C. Velpmen, stated on its face, 'Dismissal with prejudice Superior Court action 516890,' this was actually in satisfaction of judgment of the above-numbered case insofar as the defendant Roy Jordan, executor for the estate of Harry E. Blodgett, deceased, and as Testamentary Trustee under the Last Will and Testament of Harry E. Blodgett, deceased, and not otherwise.

"I am authorized on behalf of my principal, the Royal Indemnity Company, to waive any right of subrogation against the co-defendant Sam G. Richardson."

That on March 9, 1948, plaintiff herein caused to be filed in Superior Court of the State of California in and for the County of Los Angeles his Petition to Perpetuate Testimony wherein Royal Indemnity Company, a corporation, and certain Does were defendants in action No. 542793. That on April 23, 1948, plaintiff's counsel in the presence of Hulen C. Callaway took the depositions of Roy R. Jordan and Bert J. Hull as the authorized representative of Royal Indemnity Company, and thereafter said depositions were duly transcribed, corrected, signed and filed.

That thereafter plaintiff caused to be filed in the Superior Court of the State of California in and for the County of Los Angeles on September 14, 1948, being case No. 549780, plaintiff's action against

Royal Indemnity Company on its policy issued to the said Blodgett, which suit was the out-growth of information [173] on the depositions taken in Superior Court action No. 542793 on April 23, 1948, of Bert J. Hull and Roy R. Jordan. That thereafter defendant Royal Indemnity Company moved to transfer said Superior Court action, last aforesaid, on the 24th day of September, 1948, and said action was removed to the Federal Court on April 24, 1948.

That thereafter on January 27, 1949, plaintiff's counsel by affiant wrote to Hulen C. Callaway wherein plaintiff's counsel cited Krueger vs. California Highway Indemnity and demanded renewed consideration toward the settling of said case and claim.

Examination of the records of Los Angeles Municipal Court reveals action No. 795847 wherein Sam G. Richardson is the defendant in an action for an account stated for the non-payment of rent at the service station heretofore identified as 836 South San Gabriel Boulevard and the records in said case reveal that deputy sheriff F. E. Tumbleson served Sam G. Richardson with a copy of summons and complaint within the County of Los Angeles on January 31, 1947.

/s/ C. PAUL DuBOIS.

Subscribed and sworn to before me this 10th day of May, 1950.

[Seal] /s/ Indistinguishable,

Notary Public in and for
Said County and State.

Exhibit No. 1

In the Superior Court of the State of California
in and for the County of Los Angeles

No. 516890

GEORGE N. OLMSTEAD, by Alford P. Olmstead,
his Guardian ad Litem,

Plaintiff,

vs.

SAM G. RICHARDSON, ROY JORDAN, Individ-
ually, as Executor of the Estate of Harry E.
Blodgett, Deceased, and as Trustee under the
last Will and Testament of Harry E. Blodgett,
deceased, JOHN DOE, DOE COMPANY, a
Corp., and DOE & ROE, a co-partnership,
Defendants.

SUMMONS

The People of the State of California Send Greet-
ings to:

Sam G. Richardson, Roy Jordan, Individually, as
Executor of the Estate of Harry E. Blodgett,
Deceased, and as Trustee under the last Will
and Testament of Harry E. Blodgett, Deceased,
John Doe, Doe Company, a corporation, and
Doe & Roe, a co-partnership, Defendants.

You are directed to appear in an action brought
against you by the above named plaintiff in the Su-
perior Court of the State of California, in and for
the County of Los Angeles, and to answer the Com-
plaint therein within ten days after the service on
you of this Summons, if served within the County
of Los Angeles, or within thirty days if served else-

where, and you are notified that unless you appear and answer as above required, the plaintiff will take Complaint, as arising upon contract, or will apply to the Court for any other relief demanded in the Complaint.

Given under my hand and seal of the Superior Court of the County of Los Angeles, State of California, this 18th day of July, 1946.

J. F. MORONEY,

County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Los Angeles.

By /s/ K. MEACHEM,
Deputy.

(Seal Superior Court, Los Angeles County)

Appearance: "A defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of his appearance, or when an attorney gives notice of appearance for him." (Sec. 1014, C.C.P.)

Answers or demurrers must be in writing, in form pursuant to rule of court, accompanied with the necessary fee, and filed with the Clerk. [175]

Return on Summons

Office of the Sheriff,
County of Los Angeles,
State of California—ss.

I Hereby Certify that I received the within summons on the 31st day of July, 1946, and on the 3rd day of August, 1946, I personally served the same on

Sam G. Richardson being one of the defendants named in said summons, by delivering to said defendant personally in the said County of Los Angeles, a copy of said summons and a copy of the complaint in the action named in said summons, attached to said copy of summons.

E. W. BISCAILUZ,

Sheriff.

By /s/ R. W. CARTER,

Deputy Sheriff.

Dated at Los Angeles, August 3, 1946.

[Endorsed]: Filed Aug. 14, 1946, Superior Court. [176]

Certificate

No. 516890

State of California,

County of Los Angeles—ss.

I, Harold J. Ostly, County Clerk and Clerk of the Superior Court within and for the county and state aforesaid, do hereby certify the foregoing to be a correct copy of the original Summons (including return attached thereto), filed August 14th, 1946, on file and/or of record in my office, and that I have carefully compared the same with the original.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the Superior Court this 10th day of May, 1950.

HAROLD J. OSTLY,

County Clerk.

[Seal] By /s/ J. ROBERT PENDLEY,

Deputy.

Exhibit No. 2

County of Los Angeles

Office of Sheriff

Eugene W. Biscailuz, Sheriff

Arthur C. Jewell, Under-Sheriff

Los Angeles 12, California

R. W. Carter, Deputy Sheriff of Los Angeles County, hereby disposes and says: That on August 3rd, 1946, at approximately 12:30 p.m. I drove into a service station on the northwest corner of San Gabriel Blvd. and Mission Drive in the City of San Gabriel and made inquiry of the owner, Robert S. Halloway, regarding one Sam Richardson, operator of a service station located approximately 125 yards north of Mission Drive on the northeast corner of San Gabriel Blvd. and Grand Ave. Mr. Halloway informed me that he knew Sam Richardson and pointed him out to me from among a scattered group of three or four men in the station. I went immediately to that station but in the short time necessary to get there the person pointed out to me had disappeared into one of the rooms of the building on the grounds and could not be seen. I asked no questions but had the attendant put five gallons of gas in my car, paid for it and drove out. I went again to the station of Mr. Halloway, told him what happened and we stood inside his station for perhaps 15 or 20 minutes before Sam Richardson again put in an appearance. Then I again drove to his station and he was never out

of my sight during the necessary time it took to drive over there and when I arrived he was standing on the curb facing San Gabriel Blvd. and in front of a building bearing number 836 which building was a part of the station property and located on the northerly portion of the property. [175] I stopped my car directly in front of Mr. Richardson, opened the right front door and stepped out directly alongside of Mr. Richardson. I asked him if he was Sam Richardson, he replied, "I am." I told him I was from the Sheriff's office and that I had a Summons and Complaint in the case of Olmstead vs. Richardson. He asked what it was all about. I showed him the Complaint that it was relative to an accident and he said, "Oh, that is something that happened three or four months ago." I got back in my car and made notations on the back of the service ticket to wit: Sam Richardson, 5 ft. 7 or 8 inches, 150-160 lbs., black wavy hair, small mustache. Asked what it was all about; I showed him Complaint, he then remarked "Oh, that is something that happened 3 or 4 months ago."

E. W. BISCAILUZ,
Sheriff.

By /s/ R. W. CARTER,
Deputy Sheriff.

Subscribed and sworn to before me this day of
May 9th, 1950.

[Seal] /s/ ELLEN C. NEILAN.
Clerk of Justice's Court of San Gabriel Township,
County of Los Angeles, State of California.

Exhibit No. 3

State of California
Department of Motor Vehicles
Division of Drivers Licenses

In the Matter of Suspension of the Privileges of
Operating and Registering Motor Vehicles in
California of

Sam Gingle Richardson also known as Sam G.
Richardson

836 S. San Gabriel Blvd.

San Gabriel, California.

Order of Suspension

Operator's License W 335589

Chauffeur's License all in your name.

License Plates and Registration Cards 69B841—
Pack.—C308173A

File No. X-13205

Case: Olmstead vs. Richardson.

Court: Superior of Los Angeles Co. Action No.
516890.

It appearing from the records of this department that the herein above named person is a judgment debtor in the above-entitled case and that he has failed to comply with the provisions of the Vehicle Code governing such matters.

Therefore, It Is Ordered That the privilege of such person to operate a motor vehicle upon the highways of this state and any and all operators' and chauffeurs' licenses evidencing such privilege

and all license plates and registration cards issued to him are hereby suspended.

This suspension will remain in effect until reinstated by this department. Means by which reinstatement may be effected are outlined on the attached sheet of instructions.

This action is taken under the authority of Section 410 of the Vehicle Code of California.

Demand Is Hereby Made for the Surrender to the Department of Motor Vehicles of any and all operators' and chauffeurs' licenses and all license plates and registration cards issued to you. Failure to comply with this demand is punishable as a misdemeanor under Section 338 of the Vehicle Code of California.

Dated this 7th day of February, 1947.

EDGAR E. LAMPTON,

Director of Motor Vehicles.

[Seal] By /s/ A. J. HOWE,
Supervisor.

Certificate of Registration and Mailing

The undersigned hereby certifies that, on the date below, he or she, as an officer or employee of the Department of Motor Vehicles, deposited in the United States Mail, Registry Division, at Sacramento, an original of the order to which this is affixed, in an envelope addressed to the person named in the order, at his or her last address as shown on the records of the Department, postage

prepaid and accompanied by Registry and Return Receipt fees.

2/7/47.

/s/ A. R. DROLLET,
Officer or Employee of
Department.

[Endorsed]: Filed May 10, 1950. [177]

I hereby certify that the record to which this is affixed is a true photographic copy of the original on file in the Department of Motor Vehicles.

5/15/50.

DEPARTMENT OF MOTOR
VEHICLES,

By /s/ G. SAWYER,
Officer or Employee.

[Title of District Court and Cause.]

Memorandum—

FINDINGS OF FACT SUPPORTED BY:

Plaintiff does not waive the point by supplying this memorandum requested by the Court but continues to urge that Royal Indemnity failed, prior to the signing of the Findings and Conclusions, to file objections to the proposed Findings.

I.

References hereinafter to plaintiff's amended complaint will be abbreviated "comp"; to plaintiff's request for admissions as "ad"; to plaintiff's interrogatories as "int."

II.

(a) Finding IV Ordinance Declaratory of Public Policy—comp Exhibit A, VII; Opinion of Justices 251 Mass. 569.

(b) VII The Policy (Exhibit A) as Required and Compulsory—comp VII and Page 3 lines 20, 21, 22, 23; Merchants v. Peterson 113 F(2d) 4.

(c) XIII Richardson on April 9, 1946, Driving the Packard with Permission and Consent Involved in an Accident—comp IX; ad 15, 1, [179] 2, 5, 8, 9, 11; int. 6.

(d) XVI Plaintiff Sustained Bodily Injury and Property Damage—comp XI page 5 line 28-32; ad 6, 7, 8.

(e) XVII Richardson Renter on April 7, Driver on April 9, Defendant in Superior Court and Judgment Debtor—comp XI; ad 1, 15, 2, 5, 6, 7, 8, 9.

(f) XVIII Royal Had Actual Notice June 12, 1946—comp XIII; int 17, 20, 21, 15, 16, 19, 24.

(g) XX Plaintiff's Judgment Unpaid—at 12, int 31, Affidavit of George N. Olmstead executed February 13, 1950.

(h) XXIV Royal Not Prejudiced—ad 12, 14; int 20, 21, 15, 16, 17, 19, 23, 24, 26, 28, 5, 2, 3, 4, 7, 8, 9, 10, 14, 22, 27, 30, 32, 34.

(i) XXV Royal's Opportunity to Defend—ad 14; int 20, 21, 15, 16, 17, 19, 23, 24, 26, 30, 34.

(j) XXVIII Royal's Admission of Consent—ad 11;

(k) XXIX Judgment Not Satisfied—int 31.

(l) XXXII Common Knowledge Regarding

Area of Operation—comp Exhibit A, VI page 3
lines 8-9, III, V.

Respectfully Submitted,

/s/ C. PAUL DuBOIS,

Attorney for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed May 17, 1950. [180]

In the District Court of the United States, South-
ern District of California, Central Division

No. 8729-C

GEORGE N. OLMSTEAD,

Plaintiff,

vs.

ROYAL INDEMNITY COMPANY, a Corpora-
tion, et al.,

Defendant.

MEMORANDUM DECISION

James M. Carter, U. S. District Judge.

The following matters were taken under submission:

(1) Motion for new trial and to set aside summary judgment heretofore entered;

(2) Motion for leave to file amendment to the answer.

The motion for new trial and to set aside the judgment raises three problems:

1. The effect of defendant's contention that there was not personal service on Sam Richardson in the Superior Court action. Relief under this point is denied for the following reasons:

(a) This is a suit on a Superior Court judgment, and the judgment is valid on its face;

(b) Defendant has not moved to set aside the Superior Court judgment, nor filed any independent action to contest the issue of personal service in the Superior Court action;

(c) Defendant has not been diligent, since it appears that at least by March 14th, the date of the letter [182] from the Warden at Folsom, defendant knew the whereabouts of Sam Richardson and could have interviewed him. This case was not decided until April 11th. The order granting the motion for summary judgment was made April 27th and judgment was entered April 27th. The affidavit of Robert E. Dunne on file shows he did not interview Sam G. Richardson until April 10th. Even this date was prior to the date of the court's decision and prior to the entry of judgment. Dunne's affidavit was not filed until May 5th, 1950;

(d) The court is convinced that Sam G. Richardson was served with process shown by affidavit of the Deputy Sheriff who made the service;

(e) Defendant is making a collateral attack in this action, on a judgment which is valid on its face.

2. Defendant contends that the sum of \$5000.00 was erroneously awarded as property damage. Re-

lief must be denied on this contention. Paragraph XI of amended complaint alleges that in the Superior Court action No. 516890, the court found that "plaintiff had been damaged on account of said bodily personal injury in the sum of \$25,000.00, and that plaintiff's estate and property was injured, wasted, destroyed, taken or carried away on account of expenses in the sum of \$4,357.00 and on account of loss of earnings in the sum of \$1,643.00" and that plaintiff obtained judgment for these sums in the Superior court action. Defendant's answer to the amended complaint admits by not denying, these allegations.

Secondly, the California Supreme Court, by its decision in *Hunt v. Authier*, 28 Cal. 2d 288, and *Moffat v. Smith*, 33 Cal. 2d 905, has laid down a new definition of property in connection with Sec. 574 of the Probate Code. Should these cases [183] continue to be good law; there is no reason to believe that this definition will be limited to cases under the Probate Code; and based on these cases and the admitted allegations of the amended complaint, the award of \$5,000.00 under the property damage provisions of the policy of insurance is proper.

3. The defendant contends that the sum of \$3,500.00 paid in satisfaction of the judgment in favor of plaintiff and against defendant, Roy R. Jordan, Executor of the Estate of Harry E. Blodgett, deceased, should be credited against any monies due the plaintiff in this action in the Federal Court. There were apparently two judgments entered in

Superior Court action No. 516890; (1) the judgment for \$3,500.00 against Jordan as Executor of the Estate of Harry E. Blodgett; (2) the judgment against Sam G. Richardson for \$31,000.00. The correspondence between the parties attached to plaintiff's "statement of reasons in opposition to motion," are not entirely satisfactory as to their meaning. They are, however, undenied. Plaintiff wrote that it was his understanding that a satisfaction of judgment against Jordan "will not satisfy the judgment against Sam G. Richardson." The attorney for the defendant replied that the \$3,500.00 "was actually in satisfaction of judgment of the above-numbered case insofar as the defendant Roy Jordan * * *" and further that the Royal Indemnity Company "waives any right of subrogation against the co-defendant Sam G. Richardson."

Defendant's liability must be measured by its policy, which was to pay \$15,000.00 for personal injury and \$5,000.00 for property damage. Blodgett and Jordan were assureds, and any person who might rent a car from Blodgett or Jordan was an additional assured. [184]

The policy could not be construed to impose a liability to the extent of \$20,000.00 upon both the owner of the car (Jordan or Blodgett) and the driver of the car. In the ordinary owner-driver situation, the insurance company, upon satisfaction of the judgment against the owner would be subrogated to the owner's rights against the driver. In the ordinary owner-driver situation, there would not be two recoveries, namely one against the owner

and one against the driver. The injured plaintiff would have two causes of action, but he would be entitled to only one satisfaction of the wrong done him and the doubling up of a recovery by the injured plaintiff would be prevented by the insurance company's exercise of its right of subrogation.

The court cannot find that it was the intention of the defendant insurance company, by the correspondence referred to above, to agree to what amounts, in substance, to a double recovery. Accordingly, the judgment will be modified as follows:

Plaintiff will prepare new findings of fact to provide in finding XXIX, that defendant's liability to the plaintiff under its insurance policy has been partially discharged to the extent of \$3,500.00 and that plaintiff's recovery herein will be the sum of \$16,500.00 plus \$14.00 costs and interest, instead of \$20,000.00 plus costs and interest. Plaintiff's conclusions of law will be likewise so modified, and a new judgment will be entered as indicated.

The motion for leave to file an amendment to the answer will be denied for the reasons set forth heretofore.

The clerk will enter a suitable Minute Order.

[Endorsed]: Filed May 22, 1950. [185]

[Title of District Court and Cause.]

MINUTE ORDER MAY 22, 1950

Calendar of Hon. James M. Carter, Dist. Judge.

It is ordered as follows:

- (1) Motion for new trial is denied;
- (2) Motion to set aside the judgment is granted;
- (3) A new judgment in the sum of \$16,500.00 plus \$14.00 costs plus interest will be entered in favor of the plaintiff;
- (4) Plaintiff will prepare new findings of fact and conclusions of law and judgment as indicated in the memorandum decision filed herewith;
- (5) Motion to file an amendment to the answer is denied. [186]

At a stated term, to wit: The February Term, A.D. 1950, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday, the 26th day of June, in the year of our Lord one thousand nine hundred and fifty. Present: The Honorable James M. Carter,
District Judge.

[Title of Cause.]

MINUTE ORDER JUNE 26, 1950

Counsel for plaintiff having submitted to the Court proposed form of new findings and judgment pursuant to the Court's decision of May 22, 1950, and the Court having considered the matter:

It Is Ordered that the memorandum decision of May 22, 1950, be and it is amended by changing the paragraph beginning on line 19 of page 4 to read as follows:

“Plaintiff will prepare new findings of fact to provide in finding XXIX, that defendant’s liability to the plaintiff under its insurance policy has been partially discharged to the extent of \$3,500.00, and that plaintiff’s recovery herein will be the sum of \$16,500.00 plus \$14.00 costs and interest, instead of \$20,000.00 plus costs and interest. Plaintiff’s conclusions of law will be likewise so modified, and a new judgment will be entered as indicated.”

The Clerk is directed to make said change by interlineation on the face of the original decision;

It Is Further Ordered that in the findings filed herein April 27, 1950, at line 21 on page 6, the word “July” be changed by the Clerk by interlineation to read “June”;

It Is Further Ordered that Finding XXIX in the findings filed April 27, 1950, be stricken, and the Clerk is directed to so mark it on the face of the original findings.

The Court having examined the proposed form of new findings submitted by counsel, and it appearing that they do not meet with the Court’s satisfaction, the Court has re-drafted said new findings, and now signs and files them, together with the judgment. [187]

[Title of District Court and Cause.]

MODIFIED FINDING OF FACT
AND CONCLUSION OF LAW

(Pursuant to May 22, 1950, Minute Order)

And Minute Order of June 26, 1950

The above-entitled cause came on regularly for disposition on defendant's Royal Indemnity Company, motion for leave to file an amendment to the answer, motion for new trial and to set aside the judgment before the Honorable James M. Carter, District Judge of the above-entitled court, on May 15, 1950, and said motions were orally argued; that plaintiff appeared by his attorney, C. Paul DuBois; that defendant, Royal Indemnity Company, a corporation, appeared by its attorneys, Tripp & Callaway by Hulen C. Callaway.

That after hearing the arguments and examining the pleadings, motions and affidavits in support of the motions, memoranda of points and authorities having been heretofore filed in support of and in opposition to said motions, and the matter having been submitted to the court for its decision, and the court being fully advised in the premises, now modifies Finding of Fact [188] numbered XXIX substitutes in lieu of Finding XXIX hereinbefore entered the following and modified Finding of Fact:

XXIX

That in Superior Court action No. 516890, County of Los Angeles, entitled, "George N. Olmstead v.

Sam G. Richardson, the Estate of Harry E. Blodgett, Deceased, et al.," two judgments were entered in behalf of the plaintiff, George N. Olmstead; one entered on or about April 17, 1947, against Roy R. Jordan, Executor of the estate of Harry E. Blodgett, deceased, for the sum of Thirty-five hundred dollars (\$3500.00) and a second and separate judgment against Sam G. Richardson, dated September 12, 1946; in the same case and in the same court in the sum of Thirty-one thousand dollars (\$31,000.00) together with plaintiff's costs in the sum of Fourteen dollars (\$14.00).

That on April 18, 1947, the defendant, Royal Indemnity Company paid to the plaintiff the sum of Thirty-five hundred dollars (\$3500.00), in satisfaction of the judgment against Roy R. Jordan, Executor of the estate of Harry E. Blodgett.

That on April 21, 1947, plaintiff's counsel addressed a letter to Hulen C. Callaway and Tripp, Callaway, Sampson and Dryden wherein it is provided in part:

"It is my understanding with you that defendant Roy Jordan waives all right of subrogation against defendant Sam G. Richardson and farther a satisfaction of judgment against Roy Jordan will not satisfy the judgment against Sam G. Richardson."

That thereafter plaintiff's counsel received a letter from Hulen C. Callaway for Tripp, Callaway, Sampson and Dryden dated April 25, 1947, wherein it is said:

“Pursuant to your suggestion, this is to advise that although the draft of the Royal Indemnity Company [189] payable to George N. Olmstead and Alford P. Olmstead, his guardian ad litem, and H. C. Velpman, stated on its face, “Dismissal with prejudice Superior Court action 516890,” this was actually in satisfaction of judgment of the above numbered case insofar as the defendant Roy Jordan, executor for the estate of Harry E. Blodgett, deceased, and as Testamentary Trustee under the Last Will and Testament of Harry E. Blodgett, deceased, and not otherwise.

“I am authorized on behalf of my principal, the Royal Indemnity Company, to waive any right of subrogation against the co-defendant Sam G. Richardson.”

The plaintiff's judgment against Sam G. Richardson in the prior civil action in the Superior Court for damages has not been satisfied in whole or in part.

The following conclusion of law is added to the conclusions of law heretofore signed and filed.

Conclusions of Law

V.

The insurance policy sued upon herein, covered and pertained to both of the judgments in favor of the plaintiff entered in Superior Court action 516890 referred to in the Findings. The liability of the defendant, Royal Indemnity Company, a

corporation, under the policy of insurance, was to pay to one person not exceeding Fifteen thousand dollars (\$15,000.00) for bodily injury; and Five thousand dollars (\$5,000.00) for property damage; together with interest and costs. That the plaintiff having recovered two judgments against two different parties growing out of the same accident, [190] is entitled to recover not more than Twenty thousand dollars (\$20,000.00) together with interest and costs from the defendant, Royal Indemnity Company by reason of the insurance policy. That the liability of the defendant, Royal Indemnity Company to the plaintiff under said insurance policy has to the extent of the sum of Thirty-five hundred dollars (\$3500.00) been partially discharged; that plaintiff, George N. Olmstead is entitled to judgment against defendant, Royal Indemnity Company, a corporation, in the sum of Sixteen thousand five hundred dollars (\$16,500.00), together with said plaintiff's allowed costs of suit in the sum of Fourteen dollars (\$14.00) in the civil action for damages in the Superior Court, together with interest on said judgment at the rate of seven per cent (7%) from September 12, 1946, to date of entry of judgment herein.

Judgment is hereby ordered to be entered accordingly.

Dated this 26th day of June, 1950.

/s/ JAMES M. CARTER,
District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed June 26, 1950. [191]

District Court of the United States, Southern District of California, Central Division

No. 8729 C

GEORGE N. OLMSTEAD,

Plaintiff,

vs.

ROYAL INDEMNITY COMPANY, a Corporation,
DOE COMPANY, a Corporation, ROE
COMPANY, a Corporation,

Defendants.

JUDGMENT

A motion having been regularly made by the plaintiff above named, and the above cause coming on to be heard on said motion of plaintiff for summary judgment upon his amended complaint for the relief demanded in said amended complaint under Rule 56 of the Federal Rules of Civil Procedure that there is no genuine issue as to any material fact, upon the affidavits in support thereof, the answers to plaintiff's request for admissions, the answers to plaintiff's interrogatories, with due proof of service of said notice of motion and affidavits in support of said motion, and upon argument had in open court, and the court having given judgment in plaintiff's favor and against Royal Indemnity Company, a corporation, in the sum of Twenty Thousand Dollars (\$20,000.00) together with court costs in the sum of Fourteen Dollars (\$14.00), together with interest at the rate of seven per cent (7%) from September 12, 1946, to [193]

date of entry which said judgment was entered April 27, 1950, in Judgment Book No. 65, Page 465, and

The defendant, Royal Indemnity Company, a corporation, thereafter having brought on its motion for leave to file an amendment to its answer to plaintiff's amended complaint, a motion for new trial and to set aside the judgment, on May 15, 1950;

It Is Ordered, Adjudged and Decreed that said judgment for plaintiff and against said defendant be and the same is set aside, and that a new judgment in the sum of Sixteen Thousand Five Hundred Fourteen Dollars (\$16,514.00) with interest thereon at seven per cent (7%) per annum from the 12th day of September, 1946, to the date hereof, making a total judgment of \$20,879.45, be entered in favor of plaintiff, George N. Olmstead, and against Royal Indemnity Company, a corporation, together with costs of this action to be taxed by the clerk against Royal Indemnity Company, a corporation, for which plaintiff shall have execution.

Enter.

Dated this 26th day of June, 1950.

/s/ JAMES M. CARTER,
District Judge.

Judgment entered June 26, 1950. [194]

Memorandum (Rule 7(h) Local Rules,
Southern District of California)

7% interest on \$16,500.00 amounts to \$1,155.00 per year or \$96.25 per month, or \$3.21 per day, or from September 12, 1946, to May 12, 1950, a period of three years eight months or \$4,325.00 to May 12, 1950, and at the daily rate thereafter of \$3.21 per day until the entry of this judgment.

Receipt of copy acknowledged.

[Endorsed]: Filed June 26, 1950. [195]

[Title of District Court and Cause.]

SUPERSEDEAS BOND

Whereas, the defendant Royal Indemnity Company, a corporation, has filed, or is about to file, a notice of appeal to the United States Court of Appeals for the Ninth Circuit to reverse or modify the judgment entered by the District Court of United States for the Southern District of California in the above-entitled cause on June 26, 1950, and to supersede said judgment; and

Whereas, the said defendant is required to give an undertaking, under seal, in the sum of \$22,347.48, conditioned for the satisfaction of the judgment in full with costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full any modification of the judgment and such costs, in-

terest, and damages as the appellate court may adjudge and award.

Now, Therefore, in consideration of the premises and of such appeal, the undersigned, Globe Indemnity Company [197] a corporation, organized and existing under the laws of the State of New York, and duly licensed to transact a general surety business in the State of California, does hereby undertake and promise on the part of the Appellant that said Appellant will comply with the conditions as above set forth, and does further agree that, upon default by the said Appellant in any of the conditions hereof, the damages and costs, not exceeding the sum aforesaid, may be ascertained in such manner as this court shall direct; that this court may give judgment hereon in favor of any person thereby aggrieved against it for the damages and costs suffered or sustained by such aggrieved party, and that said judgment may be rendered in the above-entitled cause or proceeding against it.

In Witness Whereof, the said Globe Indemnity Company, has caused these presents to be executed and its official seal attached by its duly authorized attorney in fact, at Los Angeles, California, this 30th day of June, 1950.

[Seal]

GLOBE INDEMNITY
COMPANY,

By /s/ ELMER E. FITZ,
Attorney-in-Fact.

Examined and recommended for approval as provided in Rule 8.

/s/ C. PAUL DuBOIS,
Attorney for Plaintiff.

I hereby approve the foregoing.

Dated this 5th day of July, 1950.

/s/ JAMES M. CARTER,
Judge.

State of California,
County of Los Angeles—ss.

On this 30th day of June in the year 1950, before me, L. Hollingshead, a Notary Public in and for the County and State aforesaid, personally appeared Elmer E. Fitz known to me to be the person whose name is subscribed to the within instrument and known to me to be the Attorney-in-Fact of Globe Indemnity Company and acknowledged to me that he subscribed the name of the said Company thereto as surety, and his own name as Attorney-in-Fact.

[Seal] /s/ L. HOLLINGSHEAD,
Notary Public in and for
Said County and State.

My Commission Expires May 14, 1952.

[Endorsed]: Filed July 5, 1950. [198]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Royal Indemnity Company, a corporation, hereby appeals to the Court of Appeals for the Ninth Circuit from:

The Final Judgment entered on June 26, 1950, in Judgment Book 66, at page 690.

Dated: June 30, 1950.

TRIPP & CALLAWAY,

By /s/ HULEN C. CALLAWAY,
Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 7, 1950. [199]

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

Comes Now the appellant, Royal Indemnity Company, a corporation, and designates the entire record on appeal to include the following:

1. Amended Complaint for Money Due on Contract and Exhibit "A" attached thereto;
2. Answer to Amended Complaint;
3. Plaintiff's Motion to Strike Portions of Defendant's Answer to Amended Complaint and for Summary Judgment on the pleadings;

4. Affidavit of George N. Olmstead dated February 13, 1950;
5. Affidavit of Walter N. Hatch in support of Motion for Summary Judgment dated February 14, 1950; .
6. Plaintiff's Interrogatories, dated March 10, 1950;
7. Defendant's Answers to Plaintiff's Interrogatories;
8. Plaintiff's Request for Admissions dated 2/15/50; [201]
9. Defendant's Answer to Plaintiff's Request for Admissions;
10. Defendant's Motion for Leave to File Amendment to Answer;
11. Defendant's proposed Amendment to Answer;
12. Affidavit of R. W. Clayton, dated May 4, 1950;
13. Affidavit of Hulen C. Callaway, dated May 4, 1950, together with copy of letter attached thereto;
14. Affidavit of Elizabeth E. Richardson, dated April 18, 1950;
15. Affidavit of Robert E. Dunne, dated May 3, 1950;
16. Affidavit of George E. Hosey, dated April 20, 1950;

17. Affidavit of Sam G. Richardson, dated April 10, 1950;
18. Counter-affidavit of C. Paul DuBois, together with exhibit attached thereto, dated May 10, 1950;
19. Counter-affidavit of Arthur P. Carter, dated May 9, 1950;
20. Findings of Fact and Conclusions of Law and all modifications thereto;
21. Motion for New Trial and to Set Aside Judgment;
22. Minute Order dated May 22, 1950;
23. Memorandum Decision, filed May 22, 1950;
24. Minute Order of June 26, 1950;
25. Judgment entered Book 66, Page 690;
26. All stenographic notes in the following proceedings;
 - (1) Hearing on Motion for Summary Judgment;
 - (2) Hearing on Motion for New Trial;
27. Notice of Appeal;
28. Defendant's Supersedeas Bond;
29. Designation of record on appeal;
30. Any designation of additional matter filed by plaintiff.

Dated this 13th day of July, 1950.

Respectfully submitted,

TRIPP & CALLAWAY,

By /s/ HULEN C. CALLAWAY,
Attorneys for Defendant.

Receipt of Copy acknowledged.

[Endorsed]: Filed July 14, 1950. [202]

[Title of District Court and Cause.]

PLAINTIFF'S DESIGNATION OF
RECORD ON APPEAL

Comes Now the appellee, George N. Olmstead, and designates additional documents to the record on appeal to include the following:

1. Plaintiff's Motion to Strike Portions of Defendant's Answer to Amended Complaint, For Summary Judgment on the Pleadings dated February 15, 1950, and Plaintiff's Points and Authorities in support thereof commencing at page 17 thereof.

2. Plaintiff's Memorandum of Points and Authorities in Opposition to Defendant's Motion for New Trial and all exhibits and affidavits annexed thereto, filed about May 10, 1950; together with Substituted Exhibit 3, filed about May 17, 1950.

3. Plaintiff's document entitled "Findings of Fact Supported By:" filed May 17, 1950.

4. Plaintiff's Statement of Uncontroverted Facts filed [204] February 15, 1950.

Dated this 21st day of July, 1950.

Respectfully submitted.

/s/ C. PAUL DuBOIS,
Attorney for George N.
Olmstead.

Receipt of Copy acknowledged.

[Endorsed]: Filed July 21, 1950. [205]

[Title of District Court and Cause.]

APPLICATION AND ORDER FOR EXTENSION OF TIME TO FILE THE RECORD AND DOCKET ON APPEAL

Comes Now the defendant-appellant Royal Indemnity Company, a corporation, through Tripp & Callaway, its attorneys, and requests an extension of time to file the record on appeal to September 29, 1950, for the following reasons:

Through error in the offices of Tripp & Callaway the reporter was not requested to prepare a transcript of the hearings on the motion for new trial and the motion for summary judgment until August 1, 1950, at which time it was learned that said reporter, namely Samuel Goldstein, will be on his vacation during the entire month of August and

will be unable to have the minutes transcribed until after that time.

Therefore it is respectfully requested that defendant-appellant have to and including September 29, 1950, within which to file the record on appeal herein.

TRIPP & CALLAWAY,

By /s/ HULEN C. CALLAWAY,

It Is So Ordered:

/s/ BEN HARRISON,

Judge.

[Endorsed]: Filed August 2, 1950. [207]

In the United States District Court Southern Dis-
trict of California Central Division

No. 8729-C Civil

GEORGE N. OLMSTEAD,

Plaintiff,

vs.

ROYAL INDEMNITY COMPANY, a Corpora-
tion, et al.,

Defendants.

Honorable James M. Carter, Judge Presiding

REPORTER'S TRANSCRIPT
OF PROCEEDINGS

Monday, April 3, 1950

Appearances:

For the Plaintiff:

C. PAUL DuBOIS, ESQ., and
HOWARD VELPMAN, ESQ.

For the Defendant Royal Indemnity Company:
TRIPP & CALLAWAY, by:
F. V. LOPARDO, ESQ.

Monday, April 3, 1950, 2:00 P.M.

The Court: I am sorry to be late, but I was looking over the file and I discovered it was probably a little more intricate than I thought it was. It took me a little longer to look it over than I thought it would.

Mr. DuBois: Plaintiff at this time moves to associate, for the purpose of this motion, and for this motion only, former co-counsel for and on behalf of plaintiff, Howard Velpman.

The Court: The motion will be granted.

Mr. Velpman: Counsel, your Honor, this is a motion to strike the affirmative defenses set up by the defendant, and a motion for summary judgment. The same law would affect both motions.

This is a case being brought by a judgment creditor who on April 9, 1946, in the 1200 block of San Gabriel Boulevard, Los Angeles County, had an accident. He was struck by an automobile driven by a man by the name of Richardson. Richardson had hired this car from a concern in the City of Pasadena by the name of Blodgett's Auto Service and Tours. I am going to refer to them as Blodgett's.

Blodgett's was conducting this business pursuant to a Pasadena ordinance, which is set forth in the points and authorities, and as part of that ordinance a certain policy [2*] of insurance was required to be carried by Blodgett's.

The defendant, I believe, in his answers to the interrogatories, or in the admissions, says that the City of Pasadena, the physical limits, stops at about the 600 block on San Gabriel Boulevard, so the accident did not happen, technically, in the physical limits of Pasadena.

The first premise on which we believe this motion should be granted is that the contract of insurance

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

in this case is a contract which is issued pursuant to this statute making the contract of insurance compulsory insurance, and on the basic proposition of compulsory insurance there are no defenses. The contract itself, as well as the statute, uses the word "guarantee."

Before I get into that, I forgot to mention the fact that the judgment creditor in the California state court obtained a judgment for \$25,000.00 for personal injuries and \$6,000.00 property damage. It is that judgment which is the basis of his cause of action here on the policy.

The guarantee provision of the policy, under its Purpose clause, says:

"It is hereby understood and agreed that notwithstanding expressions inconsistent with or contrary thereto, in this policy or any endorsement thereto contained, this policy is specifically issued to cover passenger-carrying automobiles rented or [3] leased in the City of Pasadena, * * *."

There is no question but what this automobile was leased or rented in the City of Pasadena to Richardson.

The Court: What page are you reading from, of the policy?

Mr. Velpman: Page 6 of the moving party's reply memorandum. That is part of the language of the policy. Then it goes on to say:

"or which the owner uses or allows or permits to be used as drive-ur-self vehicles on the

streets in the City of Pasadena and in the event that a final judgment for any loss or claim under this policy is rendered against the owner and/or driver of such automobile, the Insurer guarantees payment direct to the plaintiff securing such judgment irrespective of the financial responsibility of the assured, and for the purpose of enforcing this guarantee, an action may be commenced and maintained against the Insurer by any such plaintiff.”

That is the specific language of the policy itself.

To go a little further than the contract itself, we have a guarantee in the contract, now that part of the policy is an endorsement which was typewritten. The standard policy, of course, is in a printed form. We have cited law on page 20 of the reply memorandum to the effect that where a [4] typewritten portion is inconsistent with the printed portion, the typewritten portion will prevail.

That is stated because we say that this assuring clause guaranteeing the payment of a judgment is inconsistent with the requirement that the assured do certain things in the way of cooperation, et cetera; purely an inconsistency in the policy. We say this clause overcomes the other clause because of its being typewritten, being in the form of an endorsement.

We also say that this policy is in the form of a third-party beneficiary contract; that when this accident happened between Richardson, who is not the named but an additional assured under this policy,

that the rights of the judgment creditor at the moment the accident happened were set, and nothing that the assured under the policy could do at a later date in the way of lack of cooperation—of course we are only at this time assuming lack of cooperation for the purpose of this motion——

The Court: Before you go on to that point, let's go back to this endorsement. Is there a photostat of the policy or typewritten copies?

Mr. Velpman: Typewritten copies only.

The Court: Where is the clause that you say the endorsement varies? Which is the clause which would defeat you if it was not for the endorsement using the word "guarantee"?

Mr. Velpman: That would be in the clause pertaining to [5] conditions to be performed by the assured.

The Court: Will you point that out to me in this long policy?

Mr. Velpman: Yes.

The Court: It is probably beginning at page 5, "Conditions," I take it.

Mr. Velpman: No. It would be on page 19. Those are the ordinary conditions you find in any insurance policy, where an assured has got to give notice of an accident, cooperate with the insurance company, send in process papers, and that sort of thing.

The Court: I just wanted to read the particular paragraph and then read this endorsement. What particular paragraph? The one you refer to, be-

ginning at line 14, "Assistance and Cooperation"?

Mr. Velpman: That is correct.

That is their defense, that is the affirmative defense they have set up in this action. They are relying on the language of the policy in this defense.

The Court: I take it that Blodgett's, or someone acting in their behalf, gave notice to the company of this accident?

Mr. Velpman: That is correct, Blodgett's did give notice to the insurance company on the 12th of June, 1946, which was three months after the accident occurred, two months, and I have forgotten the number of months but several [6] months prior to the judgment being taken against Richardson.

The Court: Had Richardson's suit been filed? Does the record show when Richardson—when Olmstead, I mean, filed his suit?

Mr. Velpman: Yes. Olmstead filed his suit—there were two suits filed; one was dismissed—in June of '46, two months after the accident.

The Court: Now, where in the policy is this language on this typewritten endorsement which you referred to?

Mr. Velpman: The bottom of page 10 and the top of 11.

The Court: The policy was a printed policy and these conditions were the ordinary printed conditions on the policy?

Mr. Velpman: The cooperation part of the policy.

The Court: Then this endorsement is a typed endorsement?

Mr. Velpman: That's right, your Honor.

The Court: Do you attach particular significance to that word "guarantee"? Do you have cases that indicate that the word "guarantee" has a—

Mr. Velpman: Yes, I have one that would help and assist you in that.

Of course we don't concede that that is the only reason for recovery in this case. That is just one theory of plaintiff's motion. The guarantee provisions should prevail and make this an absolute liability.

Our other theory is that regardless of the defenses, the [7] fact that the policy is compulsory in itself, under a statute, makes it an absolute liability policy, and there are no personal defenses to the assured.

I might take up next the Kruger case, which we do rely on considerably. That is a California case. It is on page 20 of the plaintiff's opening memorandum.

The Court: I read most of that. That is one of the things that delayed me. That case would be on all fours outside of the fact that the accident didn't happen in Pasadena.

Mr. Velpman: That is the only distinction that I could see.

The Court: How do you argue that out? What is your view on that?

Mr. Velpman: That goes to the extraterritorial power of the City of Pasadena.

The Court: I notice the policy was charged to Blodgett's, that is, the premium, on the basis of

rental, and the gross rental of Blodgett's was supplied by driving both within the City of Pasadena and without the City of Pasadena. I take it the court could take judicial notice that a company engaged in the business of renting cars for drive-yourself propositions or sightseeing busses, or whatever types of vehicles were included within this policy, would not limit itself to activities within a certain municipality. Obviously it would be very difficult to limit a drive-yourself driver to city [8] limits. The premium is charged on the basis of gross rentals, which would include rentals in and out of the city. The city, referring to the language you referred to previously, bases part of its jurisdiction to require the policy on the fact that the rental occurred in the City of Pasadena. I have those distinctions in mind.

How do you spell this out? Does the Kruger case control, under your theory, or can you draw a distinction because of this accident happening elsewhere?

Mr. Velpman: The Kruger case controls under my theory, certainly, I believe that is the situation. But I am prepared to cite further law whereby other jurisdictions in a similar situation to this have given recovery to a judgment creditor in a case of this type.

The Court: Counsel, let me say right there that I will be very interested to read some of these cases, but in about the hour and fifteen minutes I spent going through this file, I saw that there are so many cases cited that if I had to read all these cases that

have been cited I wouldn't be able to decide any other cases around here for several months. Pick out the cases you want me to read, but I am not going to read all of those unless it becomes necessary.

Mr. Velpman: I have been prepared here to argue this thing very much at length, but I believe your Honor is grasping the nub of the case much quicker than I anticipated you [9] would, and I think we can get right down to this question you have in your mind of extraterritoriality, and I will go right down to that.

Of course the ordinance itself is part of the policy. This particular ordinance, of course, is under the police power of the State of California. The ordinance in no way limits the person who may recover because of an injury. It uses the expression "any person." So does the policy use the same language. The ordinance in no way draws any limitation on where that person would be when he becomes injured. There is no limitation on the physical limits at all, as far as where that automobile is going to operate. Neither does the policy have any limitation.

Now, the cases cited by the defendant are these Massachusetts cases, and in the Massachusetts cases you will find little statements why recovery was not given to the judgment creditor, and that was because, in each case, the court always found that where the accident happened in New Hampshire, rather than the State of Massachusetts, that it did not happen on the ways of the Commonwealth of

Massachusetts, therefore there was no recovery.

The Court: I noticed that in one case, it happened on private ground; but from a hurried reading of the briefs it looked as if possibly Massachusetts was a jurisdiction where the rule is contrary. Is it your contention that all those [10] cases can be explained on the basis of accidents not on the public ways of the Commonwealth?

Mr. Velpman: That's right, for this reason: In examining the statutory law, Annotated Laws of the State of Massachusetts, under chapter 90, section 34A, "Definitions," under a section of "Compulsory Motor Vehicle Liability Insurance," down here where it says "Motor vehicle liability policy," the language is this: "... and arising out of the ownership, operation, maintenance, control, or use upon the ways of the Commonwealth of such motor vehicle."

In other words, that insurance policy under this law has restricted the situation that it has to happen on the ways of the Commonwealth of Massachusetts. That is the reason the Massachusetts Supreme Court couldn't go beyond the physical jurisdictional limits of that state.

There is no such language as that in the ordinance involved in this litigation. The ordinance here is wide open.

Now, having that in mind as a distinction——

The Court: If that is the language of the Massachusetts policy, of course that would explain all those cases, because obviously even an accident in

the State of Massachusetts on private ground would not be on the highways of the State of Massachusetts.

Mr. Velpman: That is right, that would be a correct holding. [11]

The Court: Do you concede that is the language of that Massachusetts statute, Mr. Lopardo?

Mr. Lopardo: I will not concede anything of the sort, your Honor.

The Court: All right, all right. I just thought we would pass one thing at a time.

Mr. Velpman: I was reading for the moment there the statutes of Massachusetts themselves.

We have the case of Northwest Cab Company v. Central Mutual Insurance Company, a case that arose in Illinois. In this case——

The Court: Is this one you want me to read?

Mr. Velpman: This is one I would like your Honor to read.

The Court: Go ahead and read anything from it that you want to, but let me have the citation, because I will probably want to read it afterward.

Mr. Velpman: It is 266 Illinois Appellate at page 192, Northwest Cab Company v. Central Mutual Insurance Company.

The Court: You don't have a Pacific citation on that?

Mr. Velpman: I am sorry we didn't get it.

The Court: All right. I will try to find it.

Mr. Velpman: This is a case where the State of Illinois had a statute which says, in part, that "It is unlawful for any person," and so forth, "to oper-

ate any motor vehicle upon [12] any public street or highway in an incorporated city having a population of 100,000 or more”—in other words, it affected cities of 100,000 or more—“for the carrying of passengers for hire. . . .”

The plaintiff in this case was a woman who got injured in a cab, and there was a demurrer filed, and the demurring party alleged that the policy did not cover this accident because the accident did not occur in a city of 100,000 people or more.

Well, the court finds as a fact that actually it did occur in Chicago. At least, the lower court was upheld by the appellate court that there was enough of an inference that it did. But in explaining, the court, further in support of the judgment, asks this question:

“Does the insurance policy cover accidents which occur outside of the city limits? Defendant says it does not”—and cites a Washington case—“where, in construing the statute of that state, it was held that the bond required as a condition to carrying on the business of transporting passengers for hire in a motor-propelled vehicle in any city of the first class, did not cover accidents happening beyond the city limits. However, we read the statute there considered as containing words limiting the accident covered to the confines of the city. There are no [13] such words of limitation in our statute.” That is the point I was making a while ago. “Neither in the policy are there any words limiting the territorial liability of the

insurance company.” There is not any in the policy.

“The policy provides, ‘that the Central Mutual Insurance Company shall and will pay and satisfy all final judgments,’ ” and so forth.

The Court goes on to say:

“Words limiting its territorial liability could have easily been added to the policy had the defendant so desired. The statement that is issued pursuant to the provisions of the Motor Vehicle Law means that the insured is permitted to operate its cabs within the city limits. The policy must be construed most strongly against the company issuing it, and, in case of doubt, favorably to the assured—the public in this case.”

Then the court goes on and cites another case in Louisiana, and cites another case in New Jersey. In New Jersey the policy and the statute spoke of “Port Newark.” The accident did not happen in Port Newark, but happened in the State of New Jersey. There was coverage.

Then the court ends its argument by making this statement:

“Having in mind the purpose of the statute, which is to protect the passenger public, we hold that even if the accident in question happened outside the limits of the City of Chicago, defendant is liable on its policy.”

That is exactly our position here, and I don’t know how I can find any language any stronger. That is the State of Illinois speaking.

The case of Utilities Insurance Company v. Potter, which is cited in the reply memorandum on page 13 of our brief, is a case where a policy was issued in Oklahoma to cover a band, it was under a statute as in this case. The plaintiff was riding in this bus and he got injured in the State of Tennessee and in the State of Virginia. He obtained a judgment against the bus company and then later filed suit against the bus company's insurance carrier, and in that case the court says:

“We * * * note * * * that the liability of the insurer is made coextensive with the liability of the assured, insofar as there is legal liability for damages resulting from the operation of such assured carrier * * * the general terms of the policy are applicable and include damage sustained within the territorial limits of the United States and Canada. The ultimate liability is not fixed by the provisions of the policy * * * where a liability [15] bond is filed as a prerequisite to the issuance of a license. Neither the insurer nor the assured may successfully contend that the bond limits the liability imposed * * *; * * * we find * * * liability to be coextensive with the liability of the Assured for damages resulting from the operation of any such Assured.”

That isn't what I had in mind.

“The interest of the law is to put financial responsibility behind the operator of a motor transportation company as a protection to the people. There is nothing in the language of

either which purports to limit the liability of the damages incurred only within the boundaries of this State. The insurer would have us construe such language into the law. This we cannot do.”

If your Honor will read that case in support of our proposition.

Your Honor may question whether or not the City of Pasadena has any legal power to affect somebody who is injured five feet over the border line, say. We have cited many cases here in the brief whereby various municipalities and various states, including this one, can exercise extraterritorial powers where it is incidental to carrying on something that is to be controlled within the city itself. [16]

I am not going to try to cite all those cases, because they raise different facts. But the case of *Ebrite v. Crawford*, which we have in our brief, at 215 Cal. 724, is a case——

The Court: *Ebrite*?

Mr. Velpman: *Ebrite*, E-b-r-i-t-e, v. *Crawford*.

The Court: On what page of your brief is that, do you remember?

Mr. DuBois: Page 12, your Honor, about the center of the page, under “Airports.”

The Court: All right.

Mr. Velpman: In this case two airplanes collided down near the City of Long Beach near the Long Beach Airport. The actual collision did not occur over the City of Long Beach property. Instructions were given to the jury of a certain ordinance regu-

lating air travel arising out of that airport. The appellant claimed that there was an error in giving this instruction covering this ordinance because, as I say, the accident did not happen within the physical limits of the City of Long Beach. However, the court says:

“The appellant replies to this contention that the accident occurred outside the city limits of Long Beach * * *. This argument of appellant cannot be sustained for the reason that the City of Long Beach had extraterritorial power necessary to [17] regulate and lay down rules governing the use of the municipally owned airport, lying partly within and partly without the city. By act of the legislature approved,” and so forth and so on.

The Court: Did the City of Long Beach there have certain powers over the portions of the airport that lie outside of the city by virtue of some state statute?

Mr. Velpman: Yes, that’s right. That is correct, your Honor. Then it goes on to say:

“In addition to the implication that necessarily flows from the quoted language of the statute it should be observed, as is said by the Supreme Court *In re Blois*”—a California case: “* * * Municipalities may exercise certain extraterritorial powers when the possession and exercise of such powers are essential to the proper conduct of the affairs of the municipality.’ ”

The power of Pasadena comes from the constitu-

tion, it comes from the power given in the Vehicle Code. Section 459 of the Vehicle Code says:

“The provisions of this division shall not prevent local authorities within the reasonable exercise of the police power from adopting rules and regulations by ordinance or resolution on the following matters: [18]

“(b) Licensing and regulating the operation of vehicles for hire.”

The Court: Well, that answers one inquiry I had in mind, that is, where the State has preempted a certain field, as, for instance, in the passage of a motor vehicle code. Ordinarily, except for some exception of that sort, a local municipality has no power to legislate in that particular field.

Mr. Velpman: In this case we have the actual regulation of the City of Pasadena attaching while that vehicle is in the City of Pasadena. It is an incidental of that regulation if that vehicle gets outside the city and strikes someone. Are we saying that because——

The Court: It seems to me the problem boils down to this: The City of Pasadena—I am just thinking out loud now, this isn't a decision in the matter, as I haven't heard from the other side—the City of Pasadena certainly has a right under its police power to regulate a business and to grant permits to a business operating within the city. Pursuant to that ordinance Blodgett's take out a policy of insurance and comply with the statute and get a permit to do business. In that sense it is

a statutory policy. It is a policy which they gave because they were required to give it in order to get a permit to do business. Had the accident happened within the City of Pasadena there would have [19] been no argument. Now, the accident happens outside of the city. The contract that is entered into is a voluntary contract.

Mr. Velpman: That is right.

The Court: There is no statute that says anybody has to make the contract. It merely said, if you want to do business in Pasadena and get a permit to do the business, you have to have one of these contracts.

So Blodgett's go out and get the contract from the insurance company.

You therefore have a meeting of minds between the insurance company and Blodgett's where they enter into a certain agreement, aside from the fact that the agreement was a necessary prerequisite for Blodgett's to get a permit to do business.

Now, is that situation changed any when a person is injured outside of Pasadena, rather than in Pasadena? How has the contract between the insurance carrier and Blodgett's been altered any by the happening of the accident outside of Pasadena, unless, of course, the insurance carrier wanted to put a clause in there? That might have been done.

Mr. Velpman: Limiting its coverage?

The Court: Yes.

Mr. Velpman: Which is the same thing that the Illinois case says they could have done. That is what the Oklahoma [20] case suggests.

They don't do that. They went way beyond the policy, as a matter of fact. They elected to write the risk.

If your Honor please, I could further comment upon the defenses themselves set up as not sufficient defenses, but Mr. DuBois will make a short statement on that in rebuttal to the defendant's opening statement.

Unless there are some other questions your Honor would like to ask me, I will retire at this moment.

The Court: Well, one of the defenses set up is that the insurance company had no notice.

Mr. Velpman: They have admitted notice.

The Court: They had no notice from Richardson. They admit they received notice, I thought it was June 27, 1946, from Blodgett's; is that right?

Mr. Lopardo: As to Blodgett's.

Mr. DuBois: On the interrogatories, No. 15 on page 4, they admit notice June 12, 1946.

The Court: Let's hear from the other side. I will probably call on you gentlemen again.

Mr. Lopardo: Your Honor, before I get into this I think perhaps I should bring up one point so that we can have it in most of our minds here before we get too far away.

This is an action for summary judgment, and the only thing we have to decide here is this: Is there a question of fact? [21]

We don't care about the merits of this case at all. Whether the court is going to rule one way or another, come trial that is one thing. Is there a question of fact, and that is the only thing that counts.

The Court: Of course this is a motion for summary judgment. We also have a pretrial on. So actually this is part of the pretrial where you gentlemen are advising me about the issues of this case. However, we can go more fully into the pretrial subsequent to this motion. But there are two matters on the calendar.

Mr. Lopardo: My impression, your Honor, from the clerk, I think, and from the court, when I discussed this over the phone, was that the motions would be heard first, and then after the motions we would go into the pretrial.

The Court: Well, that is all right.

Mr. Lopardo: The reason I would like to bring that up is because that is the big point. The court seems to be quizzical, in doubt and so are we, if there is a question of fact in this case, or several questions.

The Court: They have two motions on, one to strike certain paragraphs of your answer, and one for summary judgment. If these portions of your answer are stricken, and they all seem to be of the same breadth of allegations, are there still issues of fact in the case, and, if so, what? [22]

Mr. Lopardo: There would be the question of damages, the question of whether or not an accident ever occurred.

I would like to bring up a case, as the court said, on all fours in New Jersey, Merchants Indemnity Corporation of New York v. Peterson, which I just

found the other day, so it is not in my memorandum. It is 113 Fed. 2d, page 4.

The Court: Merchants Indemnity?

Mr. Lopardo: Merchants Indemnity Corporation of New York v. Peterson, 113 Fed. 2d, page 4.

That was a case where a lower court granted a summary judgment in a case just like this. There was supposedly a required insurance policy under the state law of New Jersey. A judgment was rendered against the assured, who didn't pay, then the plaintiff sued the insurance company. The assured didn't pay and the company didn't pay, so the plaintiff sued the insurance company. On a similar objection to this the lower court granted a motion to strike the very defenses which we are bringing up right here, lack of cooperation and lack of notice, et cetera; it granted that motion and granted a motion for summary judgment, and the circuit court reversed it on this ground: One, the insurance company in that case denied on information and belief as we did, that an accident ever occurred.

Remember, there had been a judgment granted. But still the court said that was a question of fact and it was for [23] trial, not for summary judgment.

That is No. 1. No. 2, plaintiffs in that case alleged there was a compulsory policy. The defendants denied it. So did we. We deny that is a compulsory policy. And the court said that is a question of fact.

The Court: According to one of the memoranda, they claim you didn't deny that. They claim you admit it is a compulsory policy, at least in the sense that you didn't deny it.

Is that right?

Mr. Du Bois: That is right.

Mr. Lopardo: That is what they allege. I am not saying it is correct.

The Court: You know what your pleadings contain. Did you or did you not?

Mr. Lopardo: We did not admit that this is a compulsory policy, and I will set forth the reasons later on, one of them being they never alleged where the accident occurred, they never alleged that the accident occurred within the jurisdiction of the policy, therefore we never admitted it at any time.

Furthermore, on closer examination, they never alleged that this particular policy was ever issued because of the policy which would be the only policy——

The Court: Wait a minute. Say that over again. Either [24] you lost it or I did.

Mr. Lopardo: There is a difference between issuing a policy pursuant to a statute, and that policy being the only policy which was required by the statute. Here is why I bring that up. In this very case, the Peterson case, it brings this point up: It does not appear from the pleadings or from anything contained in the record that the policy is one required by statute. For example, some other and earlier policy may have been the one.

Suppose this Blodgett's had taken out another policy with another company, they just wanted more insurance, and they said, "We want some more insurance pursuant to the ordinance here."

The Court: Is it your contention that plaintiff

has not alleged that this was the policy taken out pursuant to that ordinance?

Mr. Lopardo: Well, looking at this complaint——

The Court: They have got enough paragraphs in that complaint. If they didn't allege that, they wasted a lot of space.

Mr. Lopardo: I will read the language to the court on that.

Mr. DuBois: Page 3 of the amended complaint, about half way through, roman numeral paragraph VII.

The Court: Beginning line 19 it says: "That a written [25] insurance contract, such as hereinafter referred to as Exhibit A, issued by Royal Indemnity Company and dated February 16, 1946, was required by said ordinance, and was applied for because of and issued pursuant to, under and in accordance with said ordinance, and said ordinance was, at all times mentioned herein, a part of the terms, covenants and agreements of said insurance contract. That said contract, Exhibit A, was caused to be filed with the City of Pasadena. That the said City issued a municipal permit * * *."

It is a kind of long way around, but don't you think that is what they have alleged?

Mr. Lopardo: Technically, no. Here is why. They say "one such as." Well, did they have another one? Did they have——

The Court: The case isn't going to turn on technicalities of pleading of that sort. I don't think it is as concise a statement as might be drawn, but I

think it is clear that what they mean is that a written contract, to wit, Exhibit A attached hereto, was issued by Royal Indemnity under and as required by said ordinance. That is what they mean.

Mr. Lopardo: Well, your Honor, it is our contention, of course, that a summary judgment is far and away the most technical device available to either party, and it is so technical that when a moving party makes that motion all of [26] the presumptions are against that party as far as questions of fact are concerned, and all we have to have is a question of fact.

As I brought out before, we are not to determine the case on its merits at this time, but to determine whether there is a question of fact, and that is all.

The Court: What questions of fact are still in the case, should the motion to strike those paragraphs be granted? One is this one you just raised, page 3, paragraph VII, as to whether this is the policy or there might be some other policy, and so forth. Is that one question of fact?

Mr. Lopardo: That is one question of fact, your Honor. Another question is whether or not the accident occurred.

The Court: Whether this particular accident occurred?

Mr. Lopardo: Yes. Another question of fact is whether or not this is a compulsory policy. And, your Honor, if that is a question of fact, and it is as this Peterson case holds, it is a Circuit Court case, if that is a question of fact then the defenses which this plaintiff wants to strike resolve that question.

The Court: How can the question whether this is a compulsory policy, or not, be a question of fact? Isn't that a question of law?

Mr. Lopardo: I wouldn't think so, your Honor. There is the question of whether or not this was the only policy that [27] was taken out. I don't know whether or not Blodgett's took out other policies. And there are others in connection therewith that I am not in position to enumerate right now, and, as I say, all I have is this authority from the Circuit Court, Third Circuit, that says it is a question of fact.

Your Honor, I just wanted to bring that up because I didn't want to lose sight of the fact that on this motion for summary judgment the only thing that there is to be determined is if there is a material question of fact, and the case is not supposed to be determined on its merits.

The Court: Was this motion for summary judgment made, also, on the basis of the admissions in the file, replies——

Mr. Velpman: Yes, it takes those into consideration.

The Court: Is that so stated in your motion?

Mr. Velpman: Yes, I believe it is. I want to check that for certainty.

Mr. Lopardo: I don't think it is, your Honor, for several reasons. In the first place, the time for answering the admissions had been extended by counsel beyond the date that this motion for summary judgment was made, and it is my understanding that defendants still have time to answer those.

The Court: Well, it doesn't appear, unless it should appear indirectly from a reading of the statement of the [28] alleged uncontroverted facts.

Mr. Velpman: If your Honor please, we could file an amendment, if your Honor will permit us to, to make the admissions part of the record.

The Clerk: I believe it is provided for under the rule, your Honor.

Mr. Lopardo: It is our understanding that the defendants still have an opportunity to answer those admissions, because Mr. Callaway informed me last week, before he was called out of town, that he still had an opportunity to answer those admissions.

Mr. Velpman: They were served in February, and they have 10 days under the court rules to answer the admissions.

The Court: There is an answer to plaintiff's interrogatories. Now, are we talking about two different things? The answers to plaintiff's interrogatories are on file.

Mr. Velpman: They are deemed admitted if they are not answered in 10 days.

Mr. Lopardo: We can get an affidavit from Mr. Callaway when he returns that Mr. Du Bois personally gave him an extension of time to answer these admissions, and in substance words to the effect, "You can have as much time as you need in this particular."

Mr. Du Bois: Let me clear up the record. I don't want to embarrass Mr. Callaway or counsel. It happens that prior [29] to the war I was employed in the same office, and we are friends. I do want

to point out that in this particular matter the request for admissions was served and filed on February 15, 1950; the interrogatories were served and filed March 10, 1950. It is true that Mr. Callaway called about the eighth or tenth or twelfth day after the service of the request for admissions and said, in substance, "I haven't got time to get them out, but I will have them out within a couple of days, is that all right?" And I said, "Why, sure."

I don't know what to say. It was not my thought that the matter for the admissions to be answered would be subsequent to our hearing. I certainly wasn't going to cut counsel off short if he was rushed. I think with the shoe on the other foot now, they are trying to take advantage of liberality. We never discussed the matter further. Even counsel said he would have his answers to the request for admissions in within a few days.

This is, I believe, April 3rd. I have asked this counsel, Mr. Lopardo, about that matter a number of times. I have talked to Mr. Callaway about it. There was only one request for more time, at which time it was my understanding Mr. Callaway said "a few days, and we will have our points and authorities in a few days after that, reply points and authorities and pretrial memorandum."

Mr. Lopardo: Your Honor, I cannot amplify my statement [30] any further. I said that Mr. Callaway informed me that he discussed this matter with Mr. Du Bois and that he was told that he had time. When Mr. Callaway comes back, if the court desires we will have him discuss this matter with Mr. Du

Bois and the court and settle it, or we will have him submit an affidavit. But I cannot speak any further on it except to the effect that he told me he had time and he was not under the belief that the request for admissions was admitted as of this date.

The Court: Certain affidavits were filed with plaintiff's motion for summary judgment. Have there been any counter-affidavits filed?

Mr. Lopardo: No, your Honor.

Mr. Du Bois: None have been served, your Honor.

The Court: Then you don't contest the contents of those affidavits, I take it?

Mr. Lopardo: Your Honor, we have no—I want to go ahead further with the merits——

The Court: I will let you go ahead, but I want to find out about this first.

Mr. Lopardo: We have no information or belief on which to oppose those affidavits, your Honor.

For example, how do I know that they have an affidavit from a policeman who says that he talked to this man Richardson, the man lived there? We didn't know where [31] Richardson was. Right now he is in the pen, we found out the other day. We got a letter here dated March 14th: "This will acknowledge your letter that Sam Richardson is an inmate here. Folsom."

We couldn't get an affidavit in opposition to these people, whether or not he lived there. That is ridiculous.

The Court: What I am thinking about is this: You say other questions of fact remain, one of them

being, did the accident ever occur? Well, there is an affidavit as part of their motion in which some sergeant or deputy of the Sheriff's office, I believe, or maybe it was the Police Department of San Gabriel, went down and investigated this accident, found the plaintiff injured there on the highway, and a fellow by the name of Richardson——

Mr. Lopardo: Your Honor, if that very policeman were called here at the trial and put on the stand and asked about his police report or what occurred, an objection on the ground of hearsay would have to be sustained, on the ground that he wasn't there, that all he knew was what someone told him.

If that would not be admissible at the time of trial, how can these people expect to depend on an affidavit?

The Court: Even if the policeman's testimony was inadmissible, certainly the record of the Police Department would be admissible. [32]

Mr. Lopardo: I don't know why. It would be a hearsay report. That is even more dangerous. A police report is what? A statement taken after the accident, not under oath, not subject to cross-examination, not in the presence of counsel. I don't see how that possibly could be introduced. It can't be, as a matter of fact. I am pretty sure the rules of evidence are conclusive to the effect that a police report cannot be, your Honor. I just don't see how this affidavit can do more than a policeman can, and he can't testify to it. Neither can the police report

be admitted in evidence. I don't see how these affidavits show anything.

I can show that one of their affidavits apparently must be erroneous. They say service was at 804 South San Gabriel, and if you go over and look at 804 it is a nursery where they raise flowers. And unless Sam was standing in the middle of the nursery, I don't know how they could have served him. I know that. And that is talking about judicial notice.

The Court: I noticed the discrepancy in addresses. One affidavit says he resided at 836, and the affidavit of service shows he was served at 804. There was also some indication that he was operating a service station during some of this period of time. I thought possibly 804 might have been the service station.

Mr. Lopardo: No; it is a nursery run by a Japanese. [33] And unless he was standing in the middle of the flowers——

The Court: He might have been picking a posy.

Mr. Lopardo: That is right, he might have been acting like a pansy.

I would like to go on with the merits here, if I may, your Honor.

The Court: All right.

Mr. Lopardo: First, of course, on the point, is there an issue of fact? We contend there is, and we have the Circuit Court case, which of course is determinative, since this is a District Court and that is a Circuit Court decision, and there is none to the contrary in this circuit.

No. 1, going on merits, plaintiff contends that their big nut is the ordinance, and I would like very much to read the ordinance to show that it does not say what they say it says. Here it is. It is in their memorandum someplace. I would like to read the first section, Section 1, subdivision (h), which defines a drive-yourself vehicle, and that is what is involved here:

“A motor-propelled passenger vehicle or truck, other than the vehicles defined in this section, which is operated or used in the City of Pasadena, and which the owner for a consideration rents * * *.”

In other words, in order to be a drive-yourself vehicle within this ordinance two things have to be satisfied: one, [34] the particular vehicle has to be rented; and, two, it has to be driven on the city streets of Pasadena.

That is within the definition of this ordinance.

The Court: Is the ordinance in toto set forth anywhere in these pleadings?

Mr. Lopardo: I think it may have been by the plaintiff here somewhere. Let me look in his moving memorandum. I think he quotes it.

Mr. Velpman: Yes, in the opening memorandum.

Mr. Du Bois: It is in the opening memorandum of plaintiff, commencing on page 17 of the points and authorities, but not in completeness. It only excerpts that portion of the ordinance that pertains to you-drive vehicles.

Mr. Lopardo: Let's read it, then. The last para-

graph on page 17, it is the same thing I just read, definition of a drive-yourself vehicle:

“A motor-propelled passenger vehicle or truck, other than the vehicles defined in this section, which is operated or used in the City of Pasadena,——”

operated or used in the City of Pasadena——

“and which the owner for a consideration rents or leases * * *.”

Again I say two points in order to be a drive-yourself vehicle here: one, it has to be rented in the city; and, two, it has to be driven on the city streets. [35]

The Court: That would mean any trip it took would have to originate in the City of Pasadena. But you contend that it would be a drive-yourself vehicle while it was within the Pasadena city limits and it would cease to be a drive-yourself vehicle when it left the city limits?

Mr. Lopardo: That is a distinction, your Honor, I am going to bring up further. But I will just enter it now, and that is this: It isn't a question of is it a drive-yourself vehicle when it leaves the city, or is there insurance when it leaves the city? Oh, no. The question is, is it a drive-yourself vehicle covered by this ordinance when it leaves the city, is the insurance required by this ordinance when the vehicle leaves the city?

The Court: There is no dispute that this vehicle belonged to Blodgett's, was rented by Blodgett's, and left Blodgett's place of business in Pasadena.

Mr. Lopardo: All right.

The Court: Wouldn't it be stipulated that it had to, therefore, travel on some highway over the City of Pasadena before it could get to the place where the accident occurred?

Mr. Lopardo: Yes, but I don't quite understand the materiality of such a stipulation, your Honor, for this reason: The question is this, not is this a drive-yourself vehicle, not is this vehicle covered by insurance, but is it a drive-yourself vehicle covered by this statute, No. 1; [36] and, No. 2, is this insurance compulsory once it leaves the city?

Now, there is a difference. We won't say that this policy could not be voluntary insurance as to vehicles outside of the city. That is one question. The question is, is it compulsory? If it is voluntary, sure there is coverage, your Honor.

The Court: Why couldn't the insurance carrier have put in a clause of that sort if that is what it had in mind? And if it would have suggested that sort of limitation, undoubtedly the City of Pasadena would have refused to accept the policy, because the City would say, "We are figuring our rate for this on the gross receipts this man makes in his business, his business is located in the city, any trip would have to originate in the city, but obviously he may go outside the city; we are getting our revenue on his gross receipts; therefore, if you want this man to have a permit and do business with him, write him a policy, you will have to provide that your liability will cover not only in the city but also outside the city limits."

That is, in substance, what the policy says, because it didn't have any express exclusion.

Mr. Lopardo: Your Honor, the type of ordinance that has been put forth by this court, defendants will show is an unconstitutional ordinance, and it is a California case, not [37] an Illinois case or Oklahoma case. It is a California case, and it is cited in our reply memorandum.

Mr. Du Bois: Where is that case, counsel?

Mr. Lopardo: I think it is the Sackett case. Don't worry, I will get to it.

That is a case where they tried to regulate the street cars running between Pasadena and the City of Los Angeles.

If they can't do it, why can they regulate the cars? You can't do it.

These cases that we are going to rely on, showing the extraterritorial requirements are unconstitutional, are California cases.

I would like to go on and finish the ordinance.

The Court: Go ahead.

Mr. Lopardo: Another thing to show that the ordinance intended only to cover the vehicles within the city, besides section 1, subsection (h), is section 2:

"It shall be unlawful for any person, firm, association, or corporation to operate or cause to be operated at any point in the City of Pasadena any taxicab, for-hire automobile," et cetera.

Not any vehicle between the City of Pasadena and some other city. It is obvious, your Honor, it

seems to us, that this ordinance is intended to cover the vehicles on the city streets, the city streets which are used by the public of [38] Pasadena, not outside.

The Court: Wouldn't it be just as obvious that it was the intention of Pasadena to protect people who did business with concerns engaged in business in Pasadena?

Let's take a sightseeing bus, doesn't this same ordinance cover a sightseeing business?

Mr. Lopardo: I don't know, your Honor. I haven't read it with that in mind. It says "over the streets," but, again, "streets of Pasadena."

The Court: "For-hire automobiles or sightseeing automobiles." All right. Let's assume, therefore, that a citizen comes to Pasadena and goes down and takes a ride in a sightseeing bus, the company is doing business in the City of Pasadena, he goes down and buys a ticket at the hotel, the sightseeing bus takes him outside the City of Pasadena, and while he is outside the City of Pasadena he is hurt; wouldn't Pasadena have an interest to see to it that companies doing business in Pasadena, who recruited their passengers in Pasadena, who started their sightseeing trips in Pasadena, and ended them in Pasadena, protected those passengers even when they were outside of the City of Pasadena?

Mr. Lopardo: Your Honor, I think that it is beginning to exceed its powers under Article XI of the Constitution when they start doing that. Of course, all we can do—— [39]

The Court: Here is what the City of Pasadena does in the last analysis. The City of Pasadena

says, "We haven't got any control over what you do outside of the City of Pasadena; if you want to put up your stand outside of Pasadena, down at San Gabriel, keep your cars off of our streets, don't do business in our town, we have no control over you at all; but if you want to do business in our city and get a permit from us to do business, which would mean recruit your passengers, start your trips, and so forth, then you have got to put up certain insurance in which you guarantee to protect these people."

The person, therefore, who attempts to secure the insurance has the alternative to either put it up or not put it up. So he goes to an insurance company and says, "I need this kind of policy." The insurance company, therefore, contracts with Blodgett's, it is a matter of contract.

Mr. Lopardo: Voluntary contract.

The Court: Surely it is a voluntary contract, whether it is required under a statute or not required under a statute. You couldn't club the insurance company into putting up the insurance unless they wanted to.

So they entered a voluntary contract with Blodgett's. It is true that the compelling reason that caused Blodgett's and the insurance company to get together and enter into the policy was the fact that there was an ordinance in the City of [40] Pasadena. But that doesn't answer the rest of the inquiry, namely, isn't that insurance, voluntarily entered into between the company and Blodgett's, as effective outside of Pasadena as it was inside of Pasadena?

Mr. Lopardo: Our contention is, of course, it would be what is called voluntary coverage as opposed to compulsory coverage.

Since the plaintiff's two memoranda are replete with decisions, the court has asked that certain ones be pointed out for reading. Now, the defendant has only a few of them, and we would like the court to read all of them, in particular the Massachusetts cases, because we don't have many.

I will bet all in all we don't have more than ten cases.

The Massachusetts cases clearly make a distinction. In other words, the state statute there requires compulsory insurance, it is really the father of compulsory insurance contracts, that state law is, and it says that this insurance is going to cover all vehicles in certain places, just as this ordinance says this is going to cover all vehicles in certain places.

Now, the minute that a vehicle gets beyond the territorial jurisdiction of the State of Massachusetts or the City of Pasadena, the insurance is still in force, but it is considered voluntary insurance, it ceases to be compulsory insurance. In short, take the Massachusetts cases, a [41] compulsory policy is issued, the man on his way to New Hampshire, while he is in the state it is compulsory. An insurance company doesn't have to insure these people, but they do, they do it voluntarily, while that vehicle is within the confines of Massachusetts within the territory defined by the statute, it is compulsory, but the minute they go across that border there is still insurance, that is right, but it is voluntary in-

surance, and there is a difference as to liability if it is within the border and it is called compulsory, and the other.

The Court: What is this difference that you rely upon? The conditions requiring cooperation?

Mr. Lopardo: That is right. The Kruger case, which they cite, shows if it is a compulsory policy——

The Court: I follow your argument up to the “therefore.” See if I can follow you on the “therefore.” You say if so and so, now, therefore.

Mr. Lopardo: Therefore, if the policy—or if the accident, rather, occurs within that territory where the policy is still compulsory, the the liability is fixed in one manner. In other words, certain defenses aren’t available. But the minute——

The Court: Is there anything in the policy that says that?

Mr. Lopardo: There is nothing in the policy except this, [42] your Honor, that there are certain conditions, and I am going to show that the particular endorsement which they claim is attached hereto—and it is—does not waive those conditions, those conditions are still in effect, they are still in force.

The Court: This typewritten endorsement that you are talking about, doesn’t it apply, and isn’t it a part of the policy whether the accident happened in the City of Pasadena or outside of the City of Pasadena?

Mr. Lopardo: Within the city it could be considered to be compulsory, but outside of the city the insurance would cease to be compulsory and be voluntary.

The Court: It is the same endorsement.

Mr. Lopardo: Same endorsement, and all I can do is cite the cases which show your Honor that that same one insurance policy which is compulsory within the territorial jurisdiction of the governing body becomes voluntary when it is outside of the territorial jurisdiction of that governing body, your Honor.

The Court: Do you have a case which states what the difference is between a voluntary and a compulsory policy?

Mr. Lopardo: Yes, your Honor, I think the Hynding case which we cite in my brief on page 6. The citation is Hynding v. Home Accident Insurance Co., 214 Cal. 743.

Now, that case goes into a pretty extensive discussion [43] of compulsory insurance and required insurance, and it also discusses Justice Cardozo's decision in the very important case in New York, the Amsterdam case, where the Justice made the distinction between compulsory policies and voluntary policies.

As I say, it is not a new point that the coverage within the state or the city is compulsory but outside of the state it is not.

The Court: Show me where I am wrong in this. There is no law that says that you have to issue a policy.

Mr. Lopardo: That's right, your Honor.

The Court: What is the name of this company that did business at the Green Hotel, the for-hire outfit in this case?

Mr. Lopardo: Blodgett's?

The Court: Yes. Blodgett's come to you and want you to write a policy, you write a policy, that is a voluntary contract between you and Blodgett's.

Mr. Lopardo: That's right, your Honor.

The Court: Why should there be one interpretation placed on it if the accident happened in Pasadena and another if it happens outside?

Mr. Lopardo: I don't know, your Honor.

The Court: Does that sound logical to you?

Mr. Lopardo: Yes, it does, your Honor, and here is why: [44] Each municipality or each state governing body cannot take upon itself the right to say what the duties, rights, or liabilities of someone outside of that city, in an accident, are going to be. If that be true, let's suppose that Blodgett's runs a rent outfit in Pasadena, and one in Los Angeles, actually what would happen is you would have—say Los Angeles had the same ordinance that Pasadena had, and this accident occurred outside of the city between two different outfits, how are you going to determine the liability that is going to attach to the parties? How far is this city's jurisdiction going? Does Los Angeles' jurisdiction go all the way to Pasadena. Does Pasadena's go all the way to Los Angeles? Does San Francisco come all the way down to Los Angeles?

The Court: That argument leaves me cold. If this were a misdemeanor, it is true there would have to be jurisdiction here. The misdemeanor would have to be committed within the jurisdiction of the particular municipality. But all the City of Pasa-

dena has done is, it said, "Look, do you want to do business, have a stand here, get passengers out of Pasadena and run busses? You have to carry a certain kind of insurance." And they said to Blodgett's, "We don't care whether you carry it or not." Blodgett's comes to you and gets the insurance. Why should there be one rule of construction in Pasadena and one rule outside? It is true that Pasadena [45] is benefiting a passenger who might get hurt outside of Pasadena, as well as inside of Pasadena, but this jurisdiction argument logically leaves me cold. What difference does it make? Pasadena has said, "If you are going to do a certain kind of business in our city you have to have a certain kind of contract;" and he gets that kind of contract. Now, the insurance company comes in and says, "All right, we construe that in Pasadena, but insofar as anybody that got hurt outside of Pasadena, we want to put a different construction on that."

Mr. Lopardo: Such a construction doesn't necessarily follow after the accident, but before. Here is another reason favoring the difference between compulsory and voluntary, and that is this: An insurance company might be very willing to write a compulsory policy within the city, because they know in a city there are certain requirements, such as licenses for driving on the street, certain police regulations, certain safety devices are needed, the streets are kept a certain way, the risk maybe is less, whereas outside of the city the risk is a little different, therefore an insurance company writing a policy might be very willing to say, "Yes, we will write a policy which will be compulsory within the

city, because we know the risks there, we are familiar with the police, we are familiar with the streets, we are familiar with the traffic regulations, we are familiar [46] with the safety regulations, so we are willing to write a compulsory policy for that city; but we are not willing to write a compulsory policy for every vehicle that is rented outside the City of Pasadena. It may be rented in Pasadena and driven out on the Muroc Desert, so you can't make us suffer compulsory liability for vehicles outside of the city, we didn't bargain that way."

The Court: Well, the insurance carrier can insert a clause, as they did in Massachusetts under the statute, they can say "if driven on a highway." That would remove Muroc Desert. If someone wanted to take his car on the desert and smash it up, he would be excluded.

Mr. Lopardo: The ordinance says that: —used in the City of Pasadena and which the owner rents.—to be used on the city streets of Pasadena.

The Court: Counsel, if your case rested on that, I don't interpret that section to be an answer.

I think to start with, the vehicle has to be used in Pasadena, or the business has to be conducted there, or Pasadena has no jurisdiction to require the contract.

Mr. Lopardo: Your Honor, may I quote, then, from these few Massachusetts cases?

The Court: Yes.

Mr. Lopardo: The case of *Sheldon v. Bennett*, 184 NE 722, page 5 of the defendants' answering memorandum, is as follows: [47]

“The plaintiffs contend that the company should be held to have intended to give the assured the same coverage in New Hampshire which he had in Massachusetts; that if the accident had happened in Massachusetts the company was obliged to pay any person when injured up to the limits of the policy, regardless of any default on the part of the assured the fact that the policy which Samuel T. Bennett had was compulsory in Massachusetts did not by the extraterritorial indorsement continue the policy as a required or compulsory policy in the State of New Hampshire.”

And that is even stronger, because the State of New Hampshire also has a compulsory statute.

An insurance company is willing to write a policy, all right, because they feel it is only compulsory within the city, not outside of it.

Your Honor we have only three or four Massachusetts cases and we would like to call those to the attention of the court. Of course the court has already seen the distinction between the Kruger case and this, and that is in that case the accident occurred, obviously, within the territorial jurisdiction of the city, and not outside.

The Court: The reporter has been going pretty steadily here, and you have further argument. We will take a short recess and then you may continue with your argument. [48]

Mr. Du Bois: How long will your Honor be agreeable to working today?

The Court: I will keep on. It is the only thing I have on this afternoon. Why?

Mr. Du Bois: We are willing to work as long as you are, Judge.

The Court: If this case is going to be tried, what date is the trial date?

Mr. Du Bois: May 16th.

The Court: If this case is going to be tried May 16th, we have a lot to do before we can go to trial on it, so we will probably have to spend another hour, hour and a half, on this matter.

Mr. Du Bois: Thank you.

(A recess was taken.)

The Court: Proceed.

Mr. Lopardo: Your Honor, plaintiff brought up the endorsement, No. 60253, which purports to cause this policy to be issued pursuant to the ordinance, and the said first paragraph reads: "It is hereby understood and agreed that notwithstanding expressions inconsistent with or contrary thereto * * *,", and they construed that as meaning, your Honor, that it automatically waived the conditions of cooperation, notice, and so on, which are on page 19 of the policy. [49]

It is our contention, your Honor, that that is not true. When they put that endorsement in there to provide coverage for these drive-yourself vehicles, this endorsement was for the purpose of notifying anyone that it was in compliance with the ordinance, all right, but it does not say that it is waiving or altering or varying any conditions of the policy. There is nothing in there that says that.

The Court: They rely upon that word "guarantees payment." If it were not for that language, I don't think they would make much point of that endorsement.

Isn't that your point, counsel?

Mr. Velpman: Yes, your Honor, that is correct.

Mr. Du Bois: Yes.

Mr. Lopardo: On the other hand, your Honor, the "guarantees payment" clause has to be read in conjunction with the other provisions in the policy. If it said they would guarantee payment despite any and all provisions, then their contention might be tenable, your Honor; but it does not say "we will guarantee payment despite provisions which we put in this policy." They put the provisions in the policy for a reason, and a reading of the Blodgett's auto lease shows that the person who rents the vehicle is supposed to notify after an accident, supposed to supply the insurance company with summons and so forth, in obvious compliance with those particular conditions of the policy. [50]

Your Honor, I would like to advert to those conditions.

The Court: I have them in mind. You can advert to them if you want to. But do you think those conditions, if they are not altered by this endorsement, would mean that the burden would be on Blodgett's to give the necessary notice and the cooperation, or the burden would be, in this particular case, on Richardson?

Mr. Lopardo: It would be on both, your Honor, because the policy provision provides, and plain-

tiffs so admit in their memoranda, that the driver is an additional assured, and to be treated the same as the named assured, and the rental agreement also provides to that effect, your Honor; and cases in California show that an additional assured is the assured.

The Court: How would Richardson ever even know there was a policy?

Mr. Lopardo: He was told right here in the rental agreement, "You are covered by an insurance policy," and it also mentioned that he is supposed to notify Blodgett's of it, and notify them of any service of summons upon him.

The Court: Is that rental agreement an exhibit attached to any of these documents?

Mr. Lopardo: I don't know whether they put it in the case or not, your Honor.

Mr. Du Bois: It is not. [51]

Mr. Lopardo: However, it certainly will be introduced at the time of trial.

Your Honor, much has been said about notice, and the plaintiff contends that the notice of the accident was given to the insurance company sometime in June. We will admit that. At that time, about the middle of June sometime, about three months after the accident, we received a complaint served on Blodgett's. That is all we knew about that accident, and that is all anyone else, as far as we were concerned, knew about it. But that was notice of the accident, not notice of service of summons upon Sam G. Richardson, and that is the point. And the obvious reason that we couldn't possibly have known

about service of summons upon Sam G. Richardson was because Sam wasn't served, supposedly, until August 3, 1946, according to their affidavit, not according to any proof we have. According to their own affidavit in their own supporting papers, Sam G. wasn't served until August 3, 1946, so we couldn't possibly have had notice of service upon Sam in June.

The Court: I hate to interrupt you, counsel, but I am trying to get information here. I notice there is a reference to the fact that somebody else was sued. What was the name?

Mr. Lopardo: Jordan. He is the executor for Blodgett.

The Court: Was that in the same lawsuit? [52]

Mr. Lopardo: Same lawsuit.

The Court: Did the insurance company defend that lawsuit?

Mr. Lopardo: It never got to trial, your Honor. They had no facts, they didn't know anything——

The Court: Was there a settlement made, \$3,-500.00 paid?

Mr. Lopardo: That is right. Satisfaction of judgment returned therefor.

The Court: Was that a default judgment, too?

Mr. Lopardo: No, your Honor.

The Court: Who defended that action?

Mr. Lopardo: It was never defended. It might be interesting to note that at the time there was a satisfaction of judgment as to Blodgett's, without any knowledge of any facts, that a default had already been taken against Sam G. Richardson, and

the insurance company knew nothing about it, it was never brought to the attention of the insurance company.

The Court: I am having a little trouble following this. Sam Richardson apparently sued Jordan as the executor—pardon me, not Sam Richardson—Olmstead sued Sam Richardson and sued, also, Jordan.

Mr. Lopardo: That is right.

The Court: Somebody went in and defended for Jordan?

Mr. Lopardo: It was a stipulated judgment.

The Court: Well, somebody stipulated, then. Who did [53] that?

Mr. Lopardo: The insurance company. Rather, what's-his-name did—Jordan.

The Court: Jordan acting for himself?

Mr. Lopardo: No—That's right, your Honor. He was defended by the same law firm that is now before this court.

The Court: Your law firm?

Mr. Lopardo: That's right, your Honor.

The Court: What I am trying to find out is, the insurance company knew of that suit against Jordan?

Mr. Lopardo: That is right, your Honor.

The Court: And apparently permitted Jordan to enter a stipulation for judgment in a certain amount.

Mr. Lopardo: That's right, your Honor.

The Court: And Richardson is named a defendant in that same suit.

Mr. Lopardo: That's right, your Honor.

The Court: Your office had a file of that proceeding, in your office?

Mr. Lopardo: That's right, your Honor.

The Court: But you never knew Richardson was ever served?

Mr. Lopardo: That's right, your Honor. And I would like to point out the answer to that.

We would be disbarred if we answered for Sam Richardson. [54] This is an excess coverage case. If we went in there and said, "We know that Sam is served and sued, and we are going to answer for him and stipulate to a judgment," Sam could come in and say, "What right do you have to answer for me and create a liability on my part? You have no right." And if we did that we would have been disbarred. And if the insurance company did it, they would have been put out of business. You can't answer for a man unless he is served and properly served, and you can't do it unless he tells you to do it. If we did it, he could come back. Because, remember this——

The Court: Couldn't you have negotiated a settlement on behalf of Richardson, as well as Jordan?

Mr. Lopardo: Your Honor, he wasn't even in the case. He is not in the case until he is served. He wasn't served. We didn't know where he was.

The Court: Was he named as a party defendant or named as a John Doe?

Mr. DuBois: The first defendant, your Honor.

Mr. Velpman: The first one in the lawsuit.

Mr. DuBois: The person for which this office appeared was the second defendant, namely, Jordan, as the executor of the estate of Blodgett.

The Court: What is this argument, again, why you couldn't appear for Richardson?

Mr. Lopardo: Let's say we cover you by insurance, and [55] that the insurance policy is \$10,000.00, and you are sued for \$100,000.00, it is obvious that the insurance company can't pay any more than \$10,000.00, because that is their coverage. All right. We say, "Well, there was an accident, so let's cover this insured." So we go in and we enter the judgment——

The Court: An appearance?

Mr. Lopardo: Yes, an appearance for him. There is automatically, if that is a good appearance, if it is a good one——

The Court: Jurisdiction?

Mr. Lopardo: Jurisdiction, yes.

The Court: All right, go ahead.

Mr. Lopardo: The court then decides, or the jury, damages \$30,000.00, as in this case, or whatever it is, \$25,000.00. That is \$15,000.00 over the coverage. Sam never authorized us, this court never authorized us to accept any judgment or to make him subject to any judgment over \$10,000.00. Never. And if we did it, we would have been disbarred; and if the insurance company did it, they would have been put out of business.

The Court: Let's assume that argument is correct, wouldn't due diligence require that you check that file from time to time and see what happened to

Sam Richardson as to service? After all, if he was served and default was taken, you would have six months within which to set aside the default. [56]

Mr. Lopardo: I don't know that there is any case that says there is that kind of due diligence required. The cases in California, as a matter of fact, are overwhelmingly on the other side, and they show that if the assured does not cooperate or communicate, then the insurance company can pull out altogether. They have no affirmative duty of checking a file. Do you realize how many thousand people an insurance company is defending every day? They can't possibly check every file. They can't do it. It is an impossibility. If they did that, the insurance rates would be absolutely prohibitive because of the costs to every insurance company. You wouldn't have insurance. You couldn't afford to pay for it. You can't do it. This is only one case out of thousands your Honor. We couldn't stick our necks out and answer for Sam.

The Court: You admittedly stuck your neck out pretty far on the contract, if the accident happened in Pasadena—I take it you concede that the Kruger case would be the law if the accident happened in Pasadena? Had it happened in Pasadena, which you, aparently, so you told me, didn't know about for sure until you saw these affidavits as to where it happened—if it happened in Pasadena, and they served Richardson and had taken a default judgment, your contract provided you guaranteed to pay whatever that judgment amounted to. [57]

Mr. Lopardo: Your Honor, that is one of the risks that fits into the premium. But the type of

risk that this court has brought up, as distinguished from that, is not within the premium for the coverage.

In any event, your Honor, the notice is not the notice of the accident but the notice that Sam was served.

The Court: I would go along with you on the ordinary coverage where you know whom you are covering. But where you have got one of these policies that protects anybody that might get hurt, and protects any driver of any of these drive-yourself vehicles, you have got a pretty broad liability. It would seem to me that good business would require a certain amount of diligence. Even a letter to the court saying, "We appear for Mr. Jordan. Mr. Richardson has not been served. Please keep this letter in your file and advise us if and when any affidavit of service or default is requested as to Richardson."

Mr. Lopardo: As I said, the cases do not put that strong a burden upon any insurance company. They don't do it. Remember, we are not abandoning, your Honor, the point that this is not compulsory insurance.

Another point which we are going to bring up is this, that the State does have a section in its Insurance Code which covers cases such as this, Section 11580, and that section specifically says that when a judgment—Section [58] 11580 of the Insurance Code, your Honor—that section provides, in the event a judgment is recovered against an assured and it is not satisfied, then they may sue the insurance company directly on the judgment.

So this endorsement isn't saying any more than that insurance section of the State code, which certainly supersedes any kind of an ordinance of the City of Pasadena as regards extraterritorial coverage.

In other words, Section 11580 provides for the whole State; the City of Pasadena can't supersede that statute. And that statute says "subject to the conditions, provisions of that policy." And there are several cases, some of which are cited in our memoranda, which show that in construing that statute and in using the defenses of noncooperation, lack of notice, and so on, are available to the insurance company, and the ordinance can't abrogate that statute.

The notice here is more than notice of the accident. For one thing, the most important person in the world to us, as to what happened in this accident, is Sam G. Richardson, his notice of the facts as they occurred. We didn't have them. How are we going to put up a defense?

Plaintiff says, "Well, there is a police report."

We already got through saying that that is hearsay. And certainly no defendant is going to be expected to put up a defense on hearsay testimony. The courts don't provide that, [59] the law doesn't provide that, and it is not expected of any defendant to so do, your Honor, and it certainly would be a harsh burden on us to expect it. The man is supposed to give them the notice of the facts, and he didn't give them to us.

There is a question here in point 9, page 19, of the insurance policy. Paragraph 9 of the insurance policy. Plaintiff makes much of the fact that we never requested Sam G. Richardson to do anything. Well, we can't request a man to do anything, your Honor, if we don't know where he is, that is for sure. No. 2, we don't have to request him. The quotation which the plaintiff has in his reply memorandum, to the effect that we have to request, is a quotation which is not out of our policy, and we will show that it is a misconstruction of our policy.

The Court: What quotation do you refer to?

Mr. Lopardo: Your Honor, I would like to find it. Page 8 of the reply memorandum furnished by plaintiff.

On lines 21, 22, and 23 they say: "Policy provisions in re cooperation, etc."

"... the assured shall . . . upon the company's request . . . attend . . . assist . . . cooperate."

Your Honor, I will tell you where they got that, and it doesn't say that. At page 19 of the insurance policy—it [60] is one of the first things filed in the file, your Honor—paragraph 11, about line 14 or 15, "The assured shall cooperate with the company * * *."

It doesn't say "request him to cooperate." He "shall cooperate with the company . . . and, upon the company's request, shall attend hearings and trials . . ."

The request is not for cooperation, your Honor; it is not for notice; the request is only to attend trials, to attend hearings. So, you see that is ac-

tually a misconception. That is a fabricated quotation. It is not in the policy. The word "co-operate" is not requested cooperation at all. It is not here.

I will explain why the assured has to attend a trial when it is requested. Here is why. You have a case, the insurance company defends. Well, before a jury you are not supposed to tell the court or the jury that an insurance company is there, but if the defendant doesn't show up, what kind of an impression is that going to give the court and jury? The defendant isn't even interested enough to come to his own trial. Therefore, upon the request of the insurance company they are to show up at the trial.

How can we request Sam Richardson to come up to the trial when we didn't know where he was, and that he was served?

So the request isn't for notice, it isn't for cooperation, [61] it isn't for assistance; the request is to attend the trial.

So those paragraphs numbered 9, 10, 11, and 12, on page 19 of this policy, require cooperation, notice of the accident, notice of the facts, transmittal of the service of summons to the company, without request. It couldn't be otherwise. This company would be put in an absolutely unbearable position. It wouldn't be able to defend a case.

We had no notice of service, because the only notice they are talking about is the notice of the service of the summons on Jordan.

The Court: Don't you concede, if this accident occurred in Pasadena, that those defenses probably

would not have been available to you, under the Kruger case?

Mr. Lopardo: Your Honor, I hesitate to answer that for this reason——

The Court: I won't bind you to it. But don't you think it looks kind of that way?

Mr. Lopardo: I think I have a good defense to that, I think I have a good defense to the Kruger case under this policy as written, and under the ordinance of the City of Pasadena, because it doesn't inure to the public, and that is the big thing. If this thing inured to the public, rather than merely guaranteed judgment, it would be an entirely different thing. Inure to the public, that is the big thing, and it doesn't, and that is the distinction, that and a couple [62] of others. So I don't really believe the Kruger case is an issue here.

I don't want to bind myself or even volunteer my conclusion in this, but I don't think it applies. There is a difference between inure to the benefit of the public and guarantee payment.

I would like to go on further here.

That point of notice that they brought up, and which we supposedly admit, is notice of service of a summons upon Jordan, it is not notice of the facts of the accident, it is not notice of the facts of service upon Richardson.

Here is just an incidental point, and I would like to skip over it in a hurry. They want property insurance here. Let's read the ordinance. The notice does not require property insurance. So just as a further proof that this policy is both a compulsory

policy and a voluntary policy, look at the ordinance, your Honor.

The Court: Well, let's assume that you are right, that it doesn't require property insurance, but you so contract in your policy.

Mr. Lopardo: That's right. Every insurance company contracts to do something, but every insurance policy is subject to certain provisions. We contract, that's right, but we contract subject to our conditions, and our conditions are notice of accident, cooperation and assistance. Yes, we [63] voluntarily contract; yes, we do. We do it subject to our conditions. That is why we voluntarily contract, and that is further proof that this contract can be both compulsory and voluntary at the same time.

The ordinance doesn't provide for property insurance at all, yet it is contained in there. You see, your Honor, it can be. So, since the ordinance doesn't request property insurance, certainly that cannot be considered.

Plaintiff further contends, your Honor, that once the accident occurs the right arises, and therefore the assured can do nothing to jeopardize the right of the plaintiff.

There is nothing further from the truth. The cases cited in defendant's memorandum will show, and Section 11580 so provides, and there is a quotation to that effect from Cal. Jur., which is quoted in the memorandum, to this effect: The right doesn't accrue until after the judgment. It doesn't say: guarantee any cause of action. Judgment.

So anything that would happen after the accident, but before the judgment, certainly could affect the right of any plaintiff. It couldn't be otherwise, because you can't have lack of cooperation until after an accident, your Honor. You can't have lack of notice until after an accident. You can't have lack of transmittal of the papers and service of summons and the complaint until after the accident. That would all be foolish language in our decisions. So, ipso facto, it has [64] to mean after the accident but before the judgment. So that is an aborted point.

Furthermore, it will be noted that plaintiff in his reply memorandum brings up Section 11580. I am very happy that that is done, your Honor, because they are now admitting that it is the jurisdiction of the state statute which applies, and not the jurisdiction of the city ordinance, and a reading of Section 11580 provides that any recovery will have to be subject, your Honor, to the conditions of the policy. And since our conditions require notice, et cetera, that is all we ask.

Now, your Honor, I would like to bring up a point here: the reply memorandum of the plaintiff's, I believe it is the last couple of pages, page 27. Before that, as a prelude to that, the court is familiar with the fact that a judgment was rendered against Blodgett's. All right. We have joint tort feors here, your Honor. The judgment against Blodgett's, a joint tort feor, the satisfaction of which bars recovery.

The Court: Why are they joint tort feors

when a judgment against Blodgett's was for \$3,500.00, and judgment against Richardson for \$35,000.00?

Mr. Lopardo: That is error, your Honor. The California cases say you can't do that. They are joint tort feasons because the statute so says they are. That is why, your Honor. The ownership statute. And we have got cases to show, your [65] Honor——

The Court: I am a little rusty on this, but isn't there a difference that takes place after a claim is reduced to judgment?

Mr. Lopardo: If it is reduced to judgment, and there is a satisfaction, that satisfaction bars recovery of any other judgment.

The Court: No, I don't mean that. I mean this. If there are two or three joint tort feasons, and you release one joint tort feason prior to the judgment, you release them all. But after that tort claim is reduced to judgment, does that rule still prevail?

Mr. Lopardo: Yes, your Honor. We have the case here, and I have several others in support of it, because plaintiff tried to make a distinction here, and I was going to show it doesn't hold. The case of *Cole v. Roebeling*, 156 Cal. 443.

The case holds that where two joint tort feasons are sued, your Honor, and there is a default judgment taken against one of them, like against Sam Richardson, and then a subsequent judgment goes against the other one, it is the last judgment which is the prevailing judgment as to amount.

All right. Sam Richardson had a default judgment taken against him for \$31,000.00, or whatever it was, but the judgment as against Blodgett's was a smaller amount. And it is strange, because the statutory liability supposedly would have [66] been \$6,000.00, and they settled for \$3,500.00.

Now, there are two points. I have some supporting cases in that connection, but before I do go into that I would like to bring up this point. The plaintiff tries to make much of the fact that there were some letters written between counsel, saying that this wouldn't be satisfaction as to the other defendants.

Your Honor, those letters wouldn't mean a thing. Just like the releases. The law says one thing, and two parties can say all they want.

The Court: You have a right to waive rights by contract, counsel.

Mr. Lopardo: If they are not against the spirit of the law.

The Court: Is there a public policy involved with reference to joint tort feors?

Mr. Lopardo: The question isn't is there a public policy, but it is this: When there has been a satisfaction of judgment, and that has been entered, does that satisfaction of judgment satisfy the judgment as to all tort feors, or doesn't it?

The acts of the attorneys, or anybody else on the side, don't mean a thing. Here is why. The court itself brought up the question of releases. When the plaintiff releases one tort feor, he doesn't expect to release the other, and [67] neither does the

tortfeasor that executes it expect it. He is going to pay a little bit. The court doesn't say, "We don't care what you agree to." A release is a release. The cases don't say a satisfaction of judgment is a satisfaction except when a satisfaction of judgment is a satisfaction of judgment.

The Court: If you had one judgment, that would be different. Here you have two judgments. The judgment against Jordan was based on what, property damage?

Mr. Lopardo: Your Honor, the case of *Cole v. Roebling*, which I just cited, says, in effect—not in effect, but almost in so many words, on the last page, that it is the last judgment that is the determining judgment, not the first default judgment which was rendered.

I have further supporting authorities. The plaintiff here says, well, that is true as far as joint tortfeasors, they are going to admit that, but it is not true as far as joint and several. I would like to cite these further cases to show that where you have a joint liability on the part of tortfeasors, a plaintiff may sue those joint tortfeasors separately, or otherwise the liability becomes joint and several and the satisfaction of one judgment is satisfaction for all. Here are the cases: *Butler v. Ashwood*, 110 Cal. 614; *Grundel v. Union Iron Works*, 127 Cal. 438; *Dawson v. Schloss*, 93 Cal. 194; *Tompkins v. Clay Street Railroad*, 66 Cal. 163. [68]

Now, the *Grundel* case in 127 Cal. 438, and the *Dawson* case in 93 Cal., talk about this business of where you have got joint tortfeasors—joint and

several tort feasons, whether or not satisfaction of one releases the other. So that answers that contention on the part of plaintiff.

Another point is this, your Honor: We have gone outside of the record to show the satisfaction of judgment. That is indeed strange, because the whole basis of this lawsuit is a suit on a judgment, and if we can't show there is a satisfaction of the judgment I don't know what else we can show. By bringing the lawsuit, they had to go outside of the record, they had to sue on the judgment, and we certainly can show a satisfaction of that judgment. But instead they have gone outside of it when they brought in the stipulation, which has no legal effect, your Honor. And it must be remembered that when these letters were exchanged back and forth nobody knew, except the plaintiff, that a default judgment had been taken against Sam Richardson. Certainly we wouldn't have settled this case for that amount of money if we knew there was another defendant who had already been served and a judgment of \$31,000.00 rendered against him.

That doesn't make sense, your Honor. That isn't even good business sense.

Then, your Honor, in conclusion I would like to summarize very briefly by just saying this: One, this is an action for summary judgment. Is there a question of fact? We say yes, [69] several. The motion to strike should be denied for the same reason, because there are questions of fact as to——

The Court: The motion to strike rests on a different ground. The motion to strike rests upon the

ground whether or not you legally were entitled to assert certain defenses which you set forth.

Mr. Lopardo: And, of course, this case I cited so holds, 113 Fed. 2d, the Peterson case. One, it is not compulsory; it is voluntary. Since it is voluntary, we are entitled to all those defenses. Since it is voluntary, we are entitled to go to trial to determine whether or not there is any liability on the part of this defendant. And we can't urge too strongly that the cases which the defendant has in its memorandum are few and they hold that an insurance policy, such as this, as far as extra-territorial coverage is concerned, is voluntary and not compulsory, even though it is only one policy.

Two, that the insurance company is entitled to urge those defenses.

Three, that the judgment against Jordan, which was satisfied, is a satisfaction of all these judgments.

It is therefore our contention, your Honor, and we respectfully submit, that the motion for summary judgment be denied, and the motion to take away our defenses be denied.

Mr. DuBois: I apologize, your Honor, for the length of [70] plaintiff's memorandum. It is in my opinion a difficult case because there are so many legal issues involved in the case itself or the defenses that I was anticipating counsel for the defense was going to raise.

I would like to make a few comments and ask the court a question, and then I can perhaps answer the question the court asked originally, which cases does plaintiff ask the court to read?

I have listened as diligently as I can for counsel to point out any factual issues that are yet to be resolved as would defeat the motion for summary judgment. If I understand him correctly, he says that the accident never occurred, that it is compulsory insurance, and something about the policy. My notes aren't quite enough to cause me to recollect what the point was.

Mr. Lopardo: Whether or not the conditions of the policy had ever been followed.

Mr. DuBois: That, probably, in a general way touches on it. It is generally what I had in mind, but I am not sure that is precisely the position taken by counsel.

I want to say that if those are the only four factual matters contended for by the defendant insurer, if the first is the compliance with the conditions of the policy, as to whether or not, I take it this means, in counsel's position, there was a compliance or not, I take it that is assuming that [71] those defenses if properly pleaded are sufficient under this type of policy. Now, we contend that this type of policy admits of no such type of defenses. One of the cases which your Honor has indicated the court has already read, and one that we would urge is worthy of rereading for several reasons, is this *Kruger v. California Highway* case, which is excerpted quite at length commencing at page 20 of our opening memorandum. The effect of that case, as I read it and as co-counsel reads it, is, if a policy is compulsory, all of these defenses of noncooperation, notice, of forwarding of process, of notice of

accident or notice of suit, are completely immaterial, because it comes within the purview of public policy. And if that case is the law applicable to this case, the plaintiff submits that by virtue of the Kruger case, plus the construction of the policy, Exhibit 1, or Exhibit A of plaintiff's amended complaint, to aid in the determination that it is a public-required or compulsory policy, then any of these defenses raised by counsel, both in the answer and argument here today, are completely immaterial.

I think we might for the purpose of this motion assume that those facts contended by counsel are true, but plaintiff would still take the position that it doesn't make any difference, because under the Kruger case, if you once arrive at a proposition where the Kruger case controls, that this policy is compulsory insurance, that from that time on, then, these [72] conditions and their compliance is, as a matter of law, unnecessary and immaterial. So I think counsel's position as to compliance with the conditions can be decided by this court at this time in connection with, first, a motion to strike, and, secondly, a motion for summary judgment.

Secondly, counsel takes the position on damages, and as I understand his remark that means the amount of damages, if any.

The Kruger case is the leading authority in California, and it is one of the leading cases in the United States, apparently, on the proposition, it is one of the earliest, that for conclusiveness of a judgment against an insurer in a subsequent action,

that both the amount of damages shown, the things that are found by the trial court in the action against the assured, substantially everything as between the injured party and the assured, is conclusive as against the insurer, and that the insurer does not have a subsequent right to relitigate whether or not negligence existed between the assured defendant in the case brought by the injured party plaintiff, nor as to the amount.

We have cited authorities in both the opening and closing memoranda approximately on that proposition.

Counsel also raises a third proposition, that the accident ever occurred.

Now, an examination of the pleadings, I think, dispenses [73] with that particular issue.

The Court: Isn't that covered, also, by your second point, in a subsequent action by the injured person or the judgment creditor against the insurance carrier, the court isn't going to retry the first case?

Mr. DuBois: We contend it is.

The Court: It is just a matter of identity of the parties.

Mr. DuBois: That is correct. We contend that it is as to this assured *res judicata*, both identity of the parties, amount of damages, the facts found in the prior court, from which no motion under 473 of the Code of Civil Procedure was ever taken, even though that period was coterminous with this same firm of lawyers representing Blodgett's, the named assured under the policy.

But I believe under the pleadings, aside from that position that the court has just suggested, I believe under the pleadings the occurrence of the accident and the situation disclosed by the interrogatories and request for admissions, that the existence or occurrence of the accident as to this plaintiff seated in this court was a fact that was litigated at that time.

That leaves only one proposition, as to whether or not this particular policy was a compulsory policy, and counsel has, in an attempt to say that it is not compulsory, I think, [74] gone into rather a vagary of theory that I think we can answer.

The court has quickly perceived that the thing, apparently, that the Pasadena legislative body was attempting to do was to seize upon a transaction that was intra-city, and while it was within the city limits it was going to do certain things if that particular actor was to accept the benefits of the Pasadena situation or location, that it was going to have to do certain things to receive those benefits. But I want to add one further distinction. The transaction under which this particular plaintiff was injured, which counsel says is the accident, the situs of the accident, I don't believe we are particularly concerned with where the accident did happen. I think, rather, the thing with which the court is concerned, and with which we are concerned, is where did the rental transaction occur, which, as the court has seen from another aspect, the renting is the paramount thing, the accident is an incidental matter, and it is rather immaterial whether it happened

within or without the City of Pasadena, as long as the insurer has voluntarily elected to write this risk and file such a policy with the City of Pasadena, as has been alleged in the complaint, and, by failure to deny, admitted.

I think that dispels, at least it does to my mind, of all of the purported factual issues which counsel contends [75] would prevent this court giving a motion for summary judgment, and/or striking the affirmative defenses which we contend on a careful reading of the law are not sufficient under the law.

We have, and I was endeavoring to locate just before I got up, several citations, namely, one of them *Cohn v. Metropolitan*, which is a New York case. We have another one that I was endeavoring to locate, particularly, I think it is probably the same case cited by counsel, if the citation is the same, the name sounds very similar, the *Merchants Indemnity v. Peterson*, which he talks about, 113 Fed. 2d at page 4, if those are the same cases, then we consider those cases as authority for the proposition that under this showing that we have made here today we are entitled to summary judgment on these pleadings.

Let me attempt to distinguish for a moment the probable reason why counsel has cited the *Merchants Indemnity v. Peterson* case. The facts there—I have got so many cases in mind, I don't want to absolutely represent to the court that my memory is infallible in these citations. This particular case I am probably less sure of my representations as to the exact meaning of the case than I would like to be, but it

is my recollection that the Merchants Indemnity case was a case where a motion for summary judgment was made, and at the time that it was made, on the ground that it was [76] compulsory insurance, there was an allegation in the pleadings which said, because—and I think this was a New Jersey statute, as I remember—because of the New Jersey statute saying once there has been an accident which was not remedied by the judgment debtor, that thereafter there had to be, under the state legislation of that particular sovereignty, a requirement that any subsequent insurance be of a different type. Originally it was voluntary until there was an unsatisfied judgment, and thereafter it became a certain type. And it is my recollection regarding the pleadings of this particular case that in that case it was said in substance in the complaint, and denied in the allegations of the answer, that it was compulsory insurance, and the court said, if this was a type of policy on which the suit was brought that was a result of a prior unsatisfied judgment, then it would be compulsory insurance, that is true, but because the complaint does not sufficiently so allege they will send it back for that showing, and if that showing is made, then the judgment should be directed as it has heretofore been made by the trial court prior to this matter coming up to the Circuit Court.

I am almost positive those are the facts on which that particular case was made. The dicta is clear, if the plaintiff had in that pleading cured that circumstance, that summary judgment would have

there been denied. The [77] rule is well stated, and I think it is applicable to this case.

Cohn against Metropolitan—I know there is a point raised specifically in the points and authorities, your Honor—I am unable to put my finger on it at the moment—holding and citing this Cohn v. Metropolitan, that under these facts, as I believe we have them here, that we are entitled to summary judgment. I will endeavor to have co-counsel find that for us before I finish, so the court will have that particular reference.

Now, secondly, if those four positions that are contended by counsel constitute the only factual matters that require this case to go to trial, triable matter, then I would submit, your Honor, that as a matter of actual law, based on the citations which we are prepared to give further to the court, that it is not a triable issue of fact and this case can, for the purpose of this motion and assuming all of the affirmative defenses that counsel has raised in the answer, assuming for the purposes of the motion only that they are true, under the existing law that is applicable to this case, the defenses should be stricken out and plaintiff's motion for summary judgment granted.

Mr. Lopardo: Your Honor, may I interrupt for a moment, not extensively?

Those four points that he calls factual issues were in [78] response to a question by the court which was, "Presuming I strike as per plaintiff's request, what other factual points remain?"

I just wanted to make that clear. That is in addition.

The Court: I think we are all of one mind, to this effect, that if the motion to strike has to be denied, namely, if those parts of your answer which plaintiff is seeking to strike are proper parts of an answer, proper matters of defense, then there are factual issues to be tried. But if they are not proper matters of defense, if as a matter of law you are not entitled to rely upon them, then the question remains which I asked you: If they are stricken what other factual issues remain in the case?

Do we understand each other on that?

Mr. DuBois: I believe that is correct, your Honor.

That leaves, then, only the matter of noncooperation or nonnotice, as specifically pleaded by the defendant insurer in this case as factual issues upon which the matter can go to trial.

Those are affirmative defenses that we are attempting to strike, your Honor. They are no particular defenses native to plaintiff's complaint. They are a subsequent condition, if the insurance policy is to be construed in its present form, that raise those particular defenses of cooperation or noncooperation, or notice or service of process, and that sort [79] of thing.

Under the Kruger case, under the Oklahoma case, in the opening argument it was mentioned, I think the court has very quickly seized the gist of that case, and the Illinois case that has been cited, and I don't want to any extent repeat what prior counsel

has argued on this matter, I only want to narrow up one issue, if the insurer has failed to insert in a compulsory policy any language that would in any wise limit its liability as to geography, as to parties, as to types of injury, then I think we wouldn't be here. And I think the cases, such as the Oklahoma case, the Illinois case, or the Kruger case, would not have arisen.

The Court: You don't mean what you said. You don't mean if he failed to insert; you mean if he had inserted.

Mr. DuBois: If he had inserted, yes. It is because of that failure to provide in a voluntary policy, that is in the nature of a compulsory policy, the same as we have in the Pasadena ordinance, the same as we have in the language of the policy, which is quoted in Exhibit A of the amended complaint that that particular result is reached.

I want to knock over some of counsel's—with all deference to him I would call them straw men, on these defenses.

The court asked a question of counsel, which one of these conditions that are later provided in the policy would, [80] excepting for the Kruger case, defeat—let me rephrase that. Which of these conditions provided in subsequent parts of the policy, would, excepting for the endorsement starting at the bottom of page 10, defeat the plaintiff's claim?

We contend that independently, we should say in addition to, not independently, we contend that the Kruger case, because of the language in the opinion construing the word "guarantee," which is almost in haec verba with the phrase "guarantee" in this

policy, entitled plaintiff to recover. But, also, none of these conditions constitute legal defenses. That for that additional reason plaintiff is entitled to prevail on this motion for summary judgment.

I was afraid that the court might have indicated by the phrasing of that question that we were relying on but one proposition in our urging the motion for summary judgment.

The Court: No, I understand.

Mr. DuBois: Next, the issue as made by counsel in the reply memorandum, and in argument, that this particular policy is not a compulsory type of policy. Now, plaintiffs would submit, as they have already in their points and authorities, that the particular allegations of paragraph No. 7, page 3, of the amended complaint are—well, it is the same one the court has already read in earlier argument, that it is a required policy.

An examination of the pleadings will disclose that there [81] is no pleading made by this defendant to that particular paragraph.

I have a case, it is cited in the points and authorities, that such an allegation is a question of mingled fact and law.

We would contend, your Honor, that the failure to deny that particular allegation is an admission, first, that the policy is a compulsory type of policy, but, even aside from that, the construction of the policy which appears in our reply memorandum in support of the motion, I think—and I hate to say this to the court—is worth reading. There is quite a bit of work that has gone into it, but I think it is

the kind of matter that cannot be decided without somewhat of a thorough examination of the authorities, and to that extent——

The Court: I intend to read some cases, counsel, but what I am talking about, in your memorandum——well, starting at about page 18, you have about 12 cases on page 18, about 8 or 10 on page 19, I would say you have 15 or 20 cases on page 20, there must be 30 cases cited on page 21.

Mr. DuBois: That is what I was apologizing for. It is a case where there is a lot of law, but there is no bay horse case on all fours with our proposition.

The Court: I had to read it hurriedly, but it may be when I read it more thoroughly they fall into place.

Mr. DuBois: This reply memorandum was prepared in almost extreme haste. Counsel for the defendant was congested [82] with other matters and asked for an extension——

The Court: I am thankful you didn't have a lot of time.

Mr. DuBois: It was done within five days from the date of service. I talked to the clerk and said, "Assuming that counsel will stipulate that we might put the trial over for a while, what if the judge won't let us?" We had to get our issues in of record, and I want to say, in all fairness——

The Court: I shouldn't be critical. I like a lawyer who works up his case.

Mr. DuBois: This is entirely self-defense, your Honor. We wanted to get all the issues in of record prior to a time when we knew whether you would

or would not continue the matter. We thought we would be limited in our trial of the issues to those matters of record, and it is for that reason, in view of counsel for defendant taking extra time, and it was within about six days of the time the matter was coming up for pretrial, that we had to ram this thing home in a hurry. For that reason, with that background, I would like to ask the court this question: We have raised a lot of theories, which in my opinion I believe each one of them would be sufficient——

The Court: Pardon me just a minute.

(Slight delay in proceedings.)

The Court: Go ahead.

Mr. DuBois: We have raised a lot of theories that I [83] in all sincerity believe to be sufficient, in the nature of anticipating counsel's argument on extraterritoriality. Some of these my co-counsel and I disagree with as to effect. I am not asking the court to tell me how we should try our case. I would like to know from the bench, if we might have some indication, as to which of the particular theories the court feels it would like to hear more about.

Now, we have these types of situations. In this particular case an examination of the interrogatories, admissions, and pleadings will disclose that a service of process was made on Richardson about June——

Mr. Lopardo: No. It was August 3, 1946, your Honor.

Mr. BuBois (Continuing): ——about June, and

in a second suit started by the same plaintiff, Olmstead, a second service of process was made about August. Now, the judgment against Richardson occurred about September. The interrogatories, the admissions, disclose that they, the insurer, received notice of the extent of the injury, that it was personal injury, that it happened at a particular point, a car in the possession of a particular man, who was first on the list of defendants, the second name was Blodgett's Auto Service—we contend that is actual notice, and we have a number of actual cases, federal cases, that hold notice is not required from the specific named additional insured. It can come through any of several people, even from [84] plaintiff's counsel. So we are contending that one of the issues, which we would like to hear the court's reaction to, is whether or not actual notice from a person other than the named assured, who counsel are now urging should, under the terms of the policy narrowly construed—that he himself and only himself should give notice. If the court is interested any more in that type of citation, we have a number of others like, for example, the duty to defend. We have cited cases that where an insurer has actual knowledge and has the copy of the summons and complaint in its possession, I am thinking now of the type of case where a chauffeur is the person in possession of a vehicle at the time of the accident, and his employer is the assured, they hold that under that type of circumstance the insurer who has—and there are citations in our points and authorities—the opportunity to defend, having knowledge, has the correlative duty to defend.

The Court: Where are these alternatives set forth in your brief?

Mr. DuBois: In the reply memorandum at about—the first one that calls itself to my eye is on page 24, under No. 10. For example, in this type of policy it is immaterial whether——

The Court: What have these got to do with the motion? I am not going to hear the pretrial this afternoon. I will give you another date for the pretrial. [85]

Mr. DuBois: They have this to do with the motion: Assuming any of these facts alleged, and for the purpose of this motion I imagine they are deemed to be true, any of these facts contended by the defendant insurer are true, even if they be true, under these alternative authorities they constitute still no defense under the existing law.

It is that type of thing that I endeavored to learn from your clerk as to how much authority you would want, or how much it would be reasonable to impose on you, and we collectively couldn't——

The Court: Well, let me read the memorandum. I very frankly wasn't able to digest all of your memorandum. I just had time to skim through it.

Mr. DuBois: If the court could indicate any particular subjects that the court is interested in, on the disposition of the motion, I could certainly very quickly indicate to the court which cases we would like the court to read, and there are a number of these theories that may be, to the court, something that the court already has some familiarity with,

and to that extent I couldn't anticipate with preciseness, with terseness, I should say, what the court would want to hear.

The Court: It is obvious that I will have to give this some study and read some of these cases. I am going to take the matter under submission—— [86]

Mr. DuBois: If the court could indicate—of course it is kind of hard for me to tell the court that I can give you one case out of a category that is going to satisfactorily cover all propositions for which it is urged. I didn't put them in there to be repetitious. They are not cumulative. I would like to do anything I can. I think it is an unfair burden for an attorney to ask a judge to read this many cases. I would hate to have it thrown at me, and I hated to do it to you. On the other hand, I wanted to do the most I could for the plaintiff.

The Court: Lawsuits generally boil themselves down to one or two relatively simple issues. When all the fuss and fury is over with and you sit down to decide one of these cases, you will find it comes down to one or two little simple problems. This may be an exceptional case, but my guess is that a decision in this case will hinge upon much the same sort of proposition.

Mr. DuBois: I think your Honor is entirely right. The only difficulty in my ascertaining those one or two points is in not being able to read your mind.

The Court: I will read the memoranda, and if I need some help I will call on you.

There is one thing that I want to have some

understanding on. Apparently the request for admissions was never answered.

Mr. DuBois: That is correct. [87]

The Court: Under the rules I take it requests for admissions not answered would ordinarily mean that those requests were to be taken as facts. However, in this case there is a representation of a reliance upon some additional time.

Mr. DuBois: I told counsel he could have some more time.

The Court: Accordingly, if I rule on this motion I am going to have to rule on it without relying upon your requests for admissions, since there has been no answer filed to them as yet, or fix a time within which the requests for admissions shall be answered——

Mr. DuBois: I think that is eminently fair, your Honor.

The Court (Continuing): —— and not decide this matter until after the request for admissions has been answered.

Mr. DuBois: I think that is eminently fair.

The Court: Under the rules, on a motion for summary judgment you may rely upon those matters, I see, from reading the rule.

Mr. DuBois: I didn't hear from counsel that he desired any further time. There was never but one request for more time made, and that was for a few days. I assumed that there was no intention to want more time, but I think that is eminently fair, if the court would fix such a time, we would be glad to have

the matter submitted for counsel to make [88] those answers.

The Court: Are we through with the argument now, except for fixing time?

Mr. DuBois: Yes, and for one possibility. If the court could indicate, having not examined the memoranda more than—let me have a few minutes more, I see some things on the second sheet that I would like to comment on most briefly.

Counsel has urged the unconstitutionality of this particular type of ordinance. An examination of the Kruger case, your Honor, passes on that very thing. Certiorari was denied by the Supreme Court of the United States. The citation is given in our reply memorandum.

Mr. Lopardo: The court asked what cases we would like to have read. Since we have so few cases in our memorandum, we would like the court to read those we have cited and those that have been brought up.

The Court: All right, sir.

Mr. DuBois: Mr. Lopardo, is it the intention of your office to file answers to the requests for admissions?

Mr. Lopardo: Yes, sir, Mr. Callaway has every intention to. They would have been in before this time. He wanted you to have them last week, except he was called out of the city and he just wasn't able to do them. He is supposed to be back in town tomorrow, maybe Wednesday, late tomorrow or Wednesday morning. [89]

Mr. DuBois: The interrogatories were answered, and I assumed the admissions were deemed—

The Court: How much time do you want to answer?

Mr. Lopardo: Would Friday be all right?

The Court: Friday is the 7th. You may have to and including Friday the 7th to make any answer you want to the request for admissions.

The matter will be submitted as of Friday, April 7th, on these motions, for the reason that I don't know yet whether I can take your requests, plaintiff's requests, as they are, or whether I have to take the requests as answered by the defendants. So the matter will be submitted as of Friday the 7th. If the answers are in, all right; if they are not in, then I will be content that I can rely upon the requests as made and unanswered.

I will give the matter some study. I am going to be trying an admiralty case the next couple of weeks, which is largely a factual matter, and I hope I don't have too much law thrown at me. If I need further argument, I will set this down for argument and ask you men to level your guns at the particular points I am interested in. If, however, I find that I don't want further argument, I will dispose of the motions sometime after April 7th.

As for a pretrial hearing, I set some cases this morning, and I haven't got my calendar up to date. What have I got on [90] the 17th of April, Mr. Clerk, in the afternoon, or the 24th in the afternoon?

I will set this for pretrial on Monday, April 17th,

at 2:00 o'clock. Of course, if my decision should be in favor of the plaintiff on the motion for summary judgment, then we won't need any pretrial, is that right?

Mr. Lopardo: I am afraid so.

The Court: But if the decision is the other way, and this case has to be tried before a jury, we are going to have some problem demarking the issues of law and fact in this case. Many of these matters are points of law that I don't see that you would submit to a jury.

Mr. DuBois: I believe it is in the nature of a case that has special issues for the jury, your Honor, but not the whole matter. As I understand the authorities, I believe it is a showing of prejudice or a showing of whether or not particular facts constitute cooperation within the meaning of the cases, that is the type of thing that would be the jury-triable issue of fact. The Abrams case in 33——

The Court: Don't give me any more cases this afternoon.

(Whereupon, at 5:00 o'clock p.m., the hearing was adjourned.) [91]

Los Angeles, California

Monday, May 15, 1950

Appearances:

For the Plaintiff:

C. PAUL DuBOIS, Esq.

For the Defendant Royal Indemnity Company:

TRIPP & CALLAWAY, by:

H. C. CALLAWAY, Esq., and

F. V. LOPARDO, Esq. [1*]

(Other court matters.)

The Clerk: No. 4 on the calendar. No. 8729-C Civil, George N. Olmstead v. Royal Indemnity Company, hearing motion of defendant Royal Indemnity Company to set aside judgment, and for a new trial; and hearing motion of defendant Royal Indemnity Company for leave to file amendment to its answer to the amended complaint.

The Court: Proceed.

Mr. Callaway: Shall I proceed?

The Court: Yes, sir.

Mr. Callaway: If the Court please, it now becomes apparent, at least to some extent, why Mr. Richardson, who was the driver of this automobile, and who had a contract with the Blodgett's Auto Service stating on its face they carried insurance for his benefit, never notified the Blodgett people or the company of this accident, or that he was ever

*Page numbering appearing at top of page of original Certified Transcript of Record.

served, because of the fact that he was never served with process.

I am not going to reargue at all the proposition of the effect of the ordinance.

The Court: That is a question of law. If I am wrong, you have got your record on that.

Mr. Callaway: That is right. I say I am not going to reargue it at this time. I do say that the court is confronted [2] with the matter, at this time, of whether or not a judgment against the Royal Indemnity Company should stand, when from the showing made there never was any valid service.

The Court: I have read the file over, and it looks to me like there are about three points that I want to hear discussed.

I don't like to criticize counsel, and I say this in kindness of spirit, but the way counsel for the plaintiff writes these briefs slays me.

Mr. Callaway: It slays me, too, your Honor.

The Court: Don't misunderstand me. I am just an ordinary guy like you are, I practiced law, but what do you do, sit down and copy a digest? This case, and the things you have presented, do present two or three points that I think ought to be considered, but they ought to be grouped in some logical way and get right down to those points.

Now, No. 1 is the general question, Was the defendant served? If he wasn't, can anything be done about it? All the problems that flow out of that. It is a very definite problem that is presented.

No. 2, that is the question as to whether or not,

under the policy, property damage is included, as well as personal liability.

It seems to me No. 3 is the question as to whether or not that \$3,500.00 payment is a credit on account of the [3] liability of the company.

There may be other problems. In spending an hour and a half on it this morning and trying to find out what this is all about, those stand out as being problems, but I can't say in reading plaintiff's brief that it was particularly helpful to me in trying to form an opinion on those things. It is true anybody can find all sorts of cases with various shades of meaning, but if you have a particular problem to decided you want to cite the cases that are on the nose or closest in point and not throw at the court an entire digest.

I have other cases to decide. I have one of Mr. Callaway's cases that I have had under submission since February that I have got to decide one of these times. That is just one of them. I can't read the number of cases that counsel cites in his briefs. I couldn't possibly do it, unless I had only this one case to work on.

Mr. Callaway: Your Honor. I think it casts an unnecessary burden. I have read those cases, every one, Mr. Lopardo or I, and they are not in point. There is no use talking of the aspect of a voidable judgment. This judgment is either void or it is good.

The Court: Let me ask you on that, let's just take up this first point on this question of lack of service. Counsel for the plaintiff, as I understand

his brief, contends that under 473 or 473 (a) of the C.C.P. there is a year within [4] which a motion can be made.

Mr. Callaway: Your Honor, that has nothing whatsoever to do with it. This is a procedural matter in which the state courts—the federal court's Rules 59 and 62 (b) govern the federal court.

Mr. Lopardo: 60 (b).

Mr. Callaway: 59 and 60 (b), and the procedural aspect of the case, in so far as the state court rules are concerned, has nothing whatsoever to do with it. Now, we have cases and have cited cases——

The Court: Mr. Clerk, let me see your copy of the rules. Let's see what those rules provide.

This is a diversity case, and do we not follow state law in this matter?

Mr. Callaway: No, sir. You do in substantive matters.

The Court: We follow the procedure under 60 (b) on newly discovered evidence, and so forth.

Under that Section 1, newly discovered evidence, it then becomes a question whether that evidence is material. Then you have another one for the judgment is void, it then becomes a question whether the judgment is void, and then we are tossed back to substantive California law on those subjects.

Mr. Callaway: But not procedural, where you have to say that the Code of Civil Procedure of California requires a motion to be made within a given time, because that is purely [5] procedural and not substantive.

The Court: I think you are properly in court

with your motion for a new trial under 60 (b), when you allege you are relying upon newly discovered evidence. The question is whether your evidence is material and whether or not the evidence, if material, or if admissible, does render the state court judgment void, and whether or not the——

Mr. Callaway: Reading on down, whether or not the judgment of the state court is equitable and should have respective application.

The Code of Civil Procedure governing the time within which a motion could be made to set aside a judgment in that court is not binding on this court in any sense whatsoever, in that it is purely procedural and not substantive.

The Court: In other words, then, all this talk in the brief about the year period, and so forth, you think is beside the point?

Mr. Callaway: It means nothing. The case of *Erie v. Thompson*, I believe, clearly decides that proposition. It is a United States Supreme Court case. It clearly decides that this court is not bound in any procedural matters by the state court, and that is purely procedural as to how long will it be before you might make a motion to set aside the judgment.

The Court: But we still get back to California law. [6] Assuming, ordinarily, a judgment not based upon personal service is a void judgment, if under California law that judgment after a certain period of time can't be attacked, then is it a nullity?

Mr. Callaway: I think so, your Honor, for this reason: In other words, it has to be procedural, the

length of time within which a certain thing may be done, and this court is not bound by that. There is one case that we have cited where, as I remember, it was a proposition like this: A man and his wife were having trouble, and she somehow got him to go to the State of Florida, she actually served him, personal service, there wasn't any question about that, but when the matter finally came back to the federal court in New York the court said that was fraudulent on its face. He was lured down there by fraud, and even though it was actual personal service, we here and now are going to set that aside.

It is the same proposition. In other words, the judgment of the State of Florida was perfectly valid on its face. It was for the first time attacked in federal court in New York State. It is in our brief. *Wyman v. Newhouse*, I believe, is the name of that case.

The Court: Those are matters of law which we can probably decide by reading some of those cases. But what about this? Your affidavits indicate that you found out in March that this man was in a penitentiary. It seems to me you [7] found out in March of this year.

Mr. Callaway: That's right.

The Court: Then it wasn't until April that you had him interviewed, then the case went to trial apparently about April 3rd, and about April 11th I rendered a decision. On April 10th you had in your possession all the facts. Then findings were prepared and conclusions of law, and we don't hear anything from you. I don't know. I kind of got the impression

that you sort of felt this might have been a sort of a sail in the wind that some lawyers like to have sometimes, that you sort of lie back on until everything goes wrong, and then you pull out your trump card and then you say, "Richardson was never served."

Mr. Callaway: No, your Honor. The truth about the matter is that Mr. Dunne was in San Francisco the weekend of the 10th, I believe, but he hadn't gotten back here, and I think we had notice of the court's ruling the next day. We had to prepare this affidavit and get Richardson's signature to it.

The Court: Yes, but what about the period between the time in March and the date of trial here? The trial was coming up. All these issues were going to be before the court.

Mr. Callaway: The trial was set May 15th. This was a summary judgment. I didn't anticipate a summary judgment in [8] this case. If the trial date—if you remember, I think it was the 17th.

The Court: That is right, the trial date was in May, and this was on motion for summary judgment.

Mr. Callaway: And I carry quite a heavy calendar. I can't do but one thing at a time. Mr. Dunne was dispatched within a week, when we received a letter from the warden that this man was in the penitentiary, within a week or ten days he was dispatched up there to personally interview him.

This wasn't a question of not playing all the trump cards, because we would have like to have presented this matter to the court before summary

judgment was entered. We just weren't in a position to do it.

You will remember this, also, if the Court please, from the information we received from Richardson, then we had to send to Texas to get the affidavits from his mother and anyone else that had personal knowledge of the fact that he was there, actually.

The Court: How could people remember back on August 3, 1946, whether they were or were not in a certain place?

Mr. Callaway: I think this: If I made a trip to New York, I would be able to remember the date that I made it. I might have to refresh my recollection from something. I don't think that is improbable.

The Court: Viewed with the rather explicit affidavit [9] of the deputy sheriff—in this case you are not confronted with just an affidavit of service where a man says, "I served somebody at a certain time"—period. Here you have a case of a deputy sheriff who not only recalls some of the events, but made some notes at the time, and the notes make sense. They fit in with what in the ordinary course of events you and I would run onto in our life. The fellow said, "What is this about?" and the deputy sheriff told him, and he said, "That happened two or three months ago, I remember." And the deputy sheriff makes a note. That is the type of thing that happens. It has the indicia of truthfulness about it.

I got sued one time for \$50,000.00. A fellow's wife had an accident, the fellow served me with the complaint. That was my first question, "What is this all

about?" And then when I saw I was sued for \$50,000.00, I don't think what I said would be printable.

But this remark that the deputy put on the back of his document has the indicia of actual veracity and truth.

Mr. Callaway: Let's analyze that just a minute.

The Court: And Richardson is admittedly an ex-convict, or presently a convict; he is not even an "ex," he is in the "big house."

Mr. Callaway: The description the deputy sheriff gives of him doesn't even fit him. And the truth about the matter is—I have sent to the warden an affidavit, I don't know [10] why it hasn't been returned, which I intended to file here, for the warden to give you an actual description of Richardson.

The Court: Where is your description of him, in what affidavit?

Mr. Callaway: In his own.

The Court: Let's have a look at it.

He says he is five foot nine, 175 pounds, straight hair, light brown with gray at the temples.

Mr. Callaway: Never wore a mustache in his life, in 15 years, that is, he said.

The Court: He says five, seven or eight, 150 to 160 pounds, wavy black hair, small mustache.

Mr. Callaway: Then it is peculiar to me that this man, Robert S. Holloway, who apparently pointed Mr. Richardson out there is no affidavit from him.

Don't misunderstand me. Maybe your namesake,

Mr. Carter, thinks that he did serve Richardson. But it has always been peculiar to me.

The Court: No relation of mine. I don't even know the man.

Mr. Callaway: I know that. I facetiously made that remark. It has always been peculiar to me that for all this time Richardson was sued in this matter, or that he had been served, that he wouldn't have turned it over to the Blodgett [11] people, at least, or mailed it to us, and it is his contention that he never was, and I don't know why he would make that contention now if it wasn't the truth. He has nothing to gain, I don't suppose.

The reason why I think the court should set this aside is that service is a question of fact, and I think the court ought to be confronted with these witnesses in this matter, and that is the reason why I think a motion for a new trial should be granted and the matter tried out on the issue of fact. It is never satisfactory to produce evidence by way of affidavit for either side. A man either was served personally or he wasn't. He says he wasn't.

I feel this way about it: Certainly I can't see how it could be said that the Royal Indemnity Company ever had a chance to interpose any defense in this case. In other words, I haven't any way of knowing, but I think on a contested matter, I don't think Mr. Olmstead would have any judgment for any \$31,000.00. That is No. 1.

No. 2 is that, after all, we were pretty much defenseless or helpless in this matter.

The Court: What does an insurance company do in a case like this? Your company knew on June 12th of 1946 that Jordan had been served.

Mr. Callaway: That's right.

The Court: And you knew that Richardson was named as a [12] party to the lawsuit.

Mr. Callaway: That's right.

The Court: What do you do in a case like that?

Mr. Callaway: First of all, we go to look for Richardson, because we want some information about the facts of the case, to know what to do with relation to Jordan. Now, what could we do? You certainly wouldn't expect me to appear for Richardson. I would be disbarred for it if he wanted to confront me with it. I had no authority to appear for him, and neither did the company. We couldn't do anything.

The Court: Is there nothing in the policy that would permit you to appear for him?

Mr. Callaway: No.

The Court: Actually——

Mr. Callaway: It happens all the time. It happens in this way: Somebody says, "I don't want to have to serve this driver, I have already served the principal, won't you appear for him?"

"No, I won't appear for him."

"Why?"

"Because suppose the judgment ran over the policy limits, the driver says to me, 'I didn't authorize you, you are not my lawyer, I didn't authorize you to appear for me, I never have been served with anything, and you go ahead and pay this, it is your

fault, I didn't authorize you to put me in this [13] lawsuit by a so-called consent answer.' "

It comes up all the time. You want to do it, you don't want to put the other side to the trouble of going out and serving somebody, but they have to do it, because you can readily see how many things might happen.

The Court: Then going on with the matter: Subsequently, probably in September of '46, you must have known that a judgment was taken against Richardson.

Mr. Callaway: I don't know whether we did or not. I think we did, though.

The Court: I don't think there is any affidavit in this file that indicates that you didn't know.

Mr. Callaway: I think we did.

The Court: What did you do in that case?

Mr. Callaway: I can't do anything. We haven't, still, any authority to appear there and make a motion to set it aside. We don't think it is any good, as far as that is concerned, as far as we are concerned, but what authority did I have as attorney for the Royal, on behalf of Richardson, to appear there and set aside a judgment for any reason? I didn't have any reason at that time to know that I could set it aside, or had any ground for setting it aside. All I know is that he never afforded us an opportunity by telling us about the accident, first, and second, about the fact that he had been served, and he hadn't afforded us an opportunity to [14] do anything, and he still admits that.

The Court: Is there no situation in which an

insurance company has a right to come in and appear for an assured when the insurance company would stand to be personally liable if they didn't appear?

Mr. Callaway: Certainly the situation arises when the assured performs his contractual obligations and tells you, "Here is a suit, take care of it." That is a different deal, again. But I would say this, if we had appeared here for Richardson voluntarily, regardless of our policy limits, we would be liable for the whole judgment. He would say, "Well, I didn't authorize you to do it, I never was served; what right did you have to step into the breach and get me into it?"

The Court: Some day the legislature, or a court, is going to knock this legal fiction of insurance companies defending in the names of assureds in an ashcan. Wigmore on Evidence, if you will check into it, has a very strong opinion that it is not a proper procedure, and that insurance companies wouldn't be any worse off if they had to come in and appear in their own proper names, than coming in and appearing in the names of assureds; that people would realize that excessive judgments rendered against insurance companies were going to cost them more money.

• That is the fix we are in now because of that situation. [15]

Mr. Callaway: Let me show you why I think you are wrong. The first state to adopt compulsory insurance was Massachusetts, sometime in the early twenties, and in Essex, Sussex, and one

other county, that make up the Boston area, for four years there was not one single defense verdict on any kind of an automobile case in those three counties. I went up there, and know. And these lawyers used to come in and say, "Don't talk to me about the facts of the case, you haven't had a defense verdict in three counties in four years." So maybe there is something to the fiction in jury trials.

The Court: That would happen, but it would eventually level off, that is Wigmore's view, that it would eventually level off.

Mr. Callaway: Maybe so. Maybe it has levelled off, but in the early twenties that is what I was informed.

The Court: Wigmore says it would level off, because after verdicts were rendered against insurance companies, the rates would go up and jurors would realize it was costing them more for insurance. But then, he said, you would have a truthful situation where the real parties were appearing before the court.

Of course we are just discussing this academically, because it has nothing to do with this case.

Mr. Callaway: I feel that this is a matter that, if [16] there is any question in the court's mind about the fact that there was or was not personal service on Richardson, that the court ought to take evidence and be confronted with the witnesses.

The Court: You have a different kind of agreement with reference to Richardson than you did, for instance, with Blodgett's or Jordan. If I am

right that this was one of these compulsory policies, the agreement of the company was to pay any judgment that was rendered against any one of these drivers, and it would obviously be within the contemplation of the parties that those drivers might or might not be responsible people. They might or might not bring in complaints if they were served. They were not paying any premium themselves, they had no relations with the company. Probably the very reason that the city required insurance was that some of them were pretty irresponsible. So, when the insurance company writes a policy that it is going to pay a judgment pertaining to any one of those individuals, number one, they are assuming a risk for what may have happened here, namely, that Richardson was served and didn't bring it in, or, number two, maybe because of the very nature of that policy there would have been some right in the insurance company to have made some appearance in the case.

Mr. Callaway: Judge, we agree to do that in every policy we write. We agree to pay whatever judgment is finally [17] rendered against the assured.

The Court: But in your ordinary policy you are dealing with an assured who has had dealings with you, one of your agents has written the policy, and you know where the man lives, you received the premium from him, and you have had some relations with him. These extra insured were people that you had no dealings with at all.

Mr. Callaway: If you loaned your automobile to one of your friends, we don't know your friends.

The Court: That is right.

Mr. Callaway: Or we don't know your employees. You might have a chauffeur that would go out and get drunk and cause forty or fifty thousand dollars worth of damage. We have no control over that. We don't think you are going to do that, but we don't know that your chauffeur won't do it, or somebody else that might be working for you in a different capacity. So that is true in all these cases. But the point is that if the man was never served, it looks like an inequitable thing to say that the Royal Indemnity Company should pay a default judgment, and to pay it in an amount, even, in excess of their policy limit.

The Court: Supposing he was served, how do you argue it then?

Mr. Callaway: If he was served, then it becomes a pure question of law as to whether you are right about this being [18] compulsory insurance or ordinary insurance, to use that term, a pure question of law.

The Court: Let's assume for argument two things: assume that he was served, and assume that as a matter of law that compulsory policy covered accidents within the City of Pasadena—rather, without the city, as well as within the city; now, where do you go from there? Do you concede, then, there is liability?

Mr. Callaway: I have to, if you are right about that.

The Court: Do you mean there would be no relief, no way in which a company could protect

itself? Let's assume that he was served, and then the company, we will say, has some information indicating that he was served, but they can't find him to interview him, and assume, as a matter of law, this was compulsory insurance that covered the accident outside the City of Pasadena, does the insurance company have to set by and let judgment be taken by default against them? Is there no remedy?

Mr. Callaway: I wouldn't know what relief they could have.

The Court: You are a good lawyer. Supposing that situation developed, what remedy would you seek? There must be some remedy that would prevent you from being nicked by a default judgment.

Mr. Callaway: Everybody is supposed to have some grasp [19] of their own affairs, and if you are not asked to defend, as attorney for the Royal Indemnity Company I wouldn't put in an appearance for anybody that hadn't gone through the usual channels; I would refuse to do it, because I don't think I have a right to appear for people that don't want me as their own lawyer. I just wouldn't do it.

The Court: I am just thinking out loud, and this may sound silly, but can you go into court and have the court appoint some lawyer?

Mr. Callaway: I haven't heard of it being done.

The Court: You appoint lawyers for people when they are missing.

Mr. Callaway: I think the average court would be reluctant to do that. They would say, "I am not going to appoint a lawyer for someone that is

not before me and is not seeking a lawyer, and for all I know is not incompetent in any way."

The Court: I am inclined to think there would be some remedy. I don't know what it might be. But I know if I knew that I was representing an insurance company, and the assured in the position Richardson was in had been served, and I couldn't find him, and a default judgment was imminent, it seems to me I would be up at night figuring out some remedy.

Mr. Callaway: Let's carry that one step further. Assume that you discovered that a default had been entered against him, and you still can't find him, what grounds are there on [20] which you are going to seek to have that set aside, even if you are willing to take the risk of acting in his behalf? He is not there to tell you. The Royal Indemnity Company has no right to appear in the action; they are not a party.

The Court: Once the default was taken against him, and he had defaulted, then your argument about appearing for him and his being subjected to a big judgment falls of its own weight, because, having defaulted, he has laid himself wide open for the full prayer of the complaint; therefore, it seems to me that you are not in the danger of—you can't make it any worse than it is. Supposing you appeared for him——

Mr. Callaway: Yes, because he comes along and says, "You had no right to appear for me, you made a general appearance and that cured any defect in the service I knew all the time I wasn't served in

this matter, that is why I didn't call upon you to act for me. Now go ahead and pay it off, even in excess of your policy limits."

The Court: I am arguing this from the standpoint that you knew he had been served.

Mr. Callaway: You mean where we knew? Well, I don't know. I just never have been confronted with a situation where we knew that a man had been served and we couldn't locate him, as to what to do.

The Court: Particularly in the federal practice where under the rules the court looks to who is the real party in [21] interest, more so than in the state practice.

I think you would have a remedy somewhere.

Mr. Callaway: I don't know what you might do. I haven't tried to fathom it out, because I never have been confronted with it. Again, I am not trying to reargue the matter, but I felt that Mr. Richardson was subject to the cooperation clause in the policy and was required, in order to take advantage or the benefit of this insurance, to notify us of an accident and to cooperate with us to the extent of turning over any suit papers that might be served on him, so that we could take timely action. He didn't do that. And we knew that much. We couldn't locate him, and that was that.

The Court: Your affidavits show that this fellow Clayton was put to work on finding Richardson March 2, 1950.

Mr. Callaway: That was before that, your Honor. My affidavits show that——

The Court: Somebody else had tried before?

Mr. Callaway: Yes. That was in preparation

for the trial and in preparation for meeting the motion for summary judgment.

The Court: On March 15th the warden wrote you that he was in the penitentiary, so sometime between March 2nd and March 15th Clayton discovered that he was in the penitentiary.

Mr. Callaway: Here is how he discovered it, and it all appears in the affidavit. [22]

The Court: It doesn't give the date.

Mr. Callaway: Mr. Richardson's brother told him that he was in some penal institution, but he didn't tell him which one. Then what we did was circularized them all.

The Court: Anyhow, on March 15th, then, you had a letter that he was in Folsom.

Mr. Callaway: I think that is the day.

The Court: The motion for summary judgment was heard on April 3rd. The decision wasn't rendered until April 11th, and the findings weren't signed until the latter part of April.

Mr. Callaway: Well, your Honor, I felt after we located him it was a matter that an attorney should undertake as far as an interview was concerned. As soon as I could arrange it, the first fellow that was free, someone was dispatched up there, and that was Bob Dunne, and at that time we didn't know what Mr. Richardson's story was.

There was nothing in that situation that we didn't want to present to the court by this time.

The Court: All right. Your argument on the matter of the property damage is that there is nothing in the contract of insurance that covered prop-

erty damage, it covered public liability, is that right?

Mr. Callaway: It is a matter, again, of the legal construction of the contract.

The contract tells you what property damage is, and we [23] can't read into that anything else.

The Court: I want to hear from them on that.

On the other point, it is your contention that this judgment of \$3,500.00 is a credit. Is the file of that Superior Court judgment in evidence in this case, Mr. Clerk, do you remember?

Mr. Callaway: I don't remember.

Mr. Lopardo: Not the whole file, but the plaintiff did file an abstract of the judgment with their answering papers in this thing.

The Court: The judgment itself is not in evidence?

Mr. Lopardo: No.

The Court: The abstract of the judgment just shows a judgment against Richardson. What was that judgment in the state court? Were there two different judgments, or one judgment? There must have been two different judgments.

Mr. Lopardo: That's right, your Honor.

The Court: What is your argument now, that the amount paid on the Blodgett judgment should be a credit against this one?

Mr. Callaway: This is now a suit against the company on its policy, and the policy says they shall be only liable for so much money for one accident. The undisputed evidence is that it has already paid——

The Court: Where does it say it will only be liable for [24] so much on one accident? In "Coverages" on the second page of that typewritten copy attached to the amended complaint?

Mr. Callaway: Page 2 of the amended complaint, Exhibit A, line 2.

The Court (Reading): "Bodily injury liability. Each person \$15,000.00. Each accident \$30,000.00."

Mr. Callaway: "Bodily injury" is then described on the same page, 25 to 29.

Then "Property damage" is defined right after that.

The Court: "To pay on behalf of the insured * * *" Of course you had more than one insured here.

On page 3, "Definition of 'Insured' "—"includes the named insured and also includes"—subdivision (2), line 29, "under coverages A and B, any person while using an owned automobile or a hired automobile. * * *"

That doesn't change it, does it?

What does this mean, "The insurance with respect to any person or organization other than the named insured does not apply under division (2) of this insuring agreement"?

Mr. Callaway: (2) is "under coverages A and B, any person while using an owned automobile or a hired automobile and any person or organization legally responsible for the use thereof"—

The Court: Where is division (2)? Where do you find division (2)? Is that the one entitled "De-

fense, Settlement, [25] Supplementary Payments''?

Mr. Callaway: Division (2) I think starts on line 29 of page 3.

The Court: Probably you are right there, division (2) must mean division (2) of roman III.

We will take a short recess and then I will hear from counsel for the plaintiff.

(A recess was taken.)

Mr. DuBois: We regret if plaintiff's memoranda have not found favor with the court, but we have raised issues on as many grounds as seemed advisable or necessary.

In answer to the court's inquiry, how were they prepared, this particular memorandum in opposition to this motion was prepared after a reading of all of the citations included. That cannot be said and, I explained to the court at the time of the argument on the motion for summary judgment, was not said of the memoranda there, because of the shortness of time after the reply memorandum in opposition to the motion was filed, and the period of time involved and having that in in time to comply with the rules in advance of the oral argument.

Plaintiff takes the position in opposition to this motion that this defendant Royal Indemnity cannot at this late date in this court attack the Superior Court judgment. That is the gist of the plaintiff's memorandum in opposition to the defendant's motion. [26]

The Court: Now, you have to break that down. Certainly the defendant can move for a new trial

on the ground of newly discovered evidence. You concede that, don't you?

Mr. DuBois: Surely, I think Rule 60 provides for that.

The Court: Then the question is: Is the fact, whether it exists or not, that Richardson was not served newly discovered evidence?

Mr. DuBois: My answer to that would be that that would be newly discovered evidence. But it is not timely discovered evidence.

The Court: Let's assume for argument that it is timely, just for argument; then is it material? How does it affect the judgment here in the federal court? I am impressed by defendant's argument that you are off on a procedural point as to state practice, while the defendant doesn't need to be concerned with that.

Mr. DuBois: It comes down to this question, as I see it, this is a state court judgment that we are considering, and to modify or to change the effect of the state court judgment, it must of necessity require state court authority.

Now, the cases cited by the moving party, Wyman v. Newhouse, on page 9 of their points and authorities in support of their motion, and Bower v. Casanove, both are distinguishable, in my opinion, because of the fact that the court there was considering an issue of fraud in the judgment [27] creditor getting jurisdiction in a state court, and I think the element of the issue of fraud being presented is a vast distinction with what we have here.

The cases in California say that is one of the rec-

ognized exceptions to the California procedural rule. But an examination of *Wyman v. Newhouse* will reveal that apparently in the New York District Court, where that case was decided, the opinion shows that there was no Florida procedural law to govern, or to provide how a state court judgment was to be modified.

Apparently, as I read that opinion, there was nothing to control. And there is a reference that in the absence of Florida substantive law they had to go to the law of the forum, namely, the United States District Court in New York.

Now, a comparable situation appears in the *Bower v. Casanove* case where the effect of that opinion seems to say they must examine the Illinois law to determine what can be done in the federal court.

Now, I have searched quite at length to find out is there a federal case on the proposition which does not include the element of fraud, and an interlineation just at the last minute before filing, on page 7 of plaintiff's memorandum in opposition to the motion, the case of *Butler v. McKay*, 138 Fed. 2d 373, certiorari was denied, seems to indicate to the plaintiff that the state rule to control a federal [28] court in its deliberation regarding the effect of a state court judgment.

That is the nearest that I have been able to find yet.

That is at the first line, your Honor, after the subject on number VII, page 7 of the memorandum.

The Court: I have found it.

Mr. DuBois: So I think, if I understand the

court's question, that case is authority, we must go, in federal court, to state court procedural laws to determine the effect of the state court judgment.

If that is correct we have here in the pleadings an admission that the judgment was taken. The effect of my affidavit filed in opposition to this motion is for one purpose, principally: that for a number of years from 1946, in September——

The Court: Where does this affidavit appear?

Mr. DuBois: The first exhibit attached to our memorandum in opposition, your Honor. It follows page 22 of the memorandum, and it is to this effect——

The Court: Let me read that. I missed that somehow or other. I missed that in going over this file. Let me read that.

Go ahead.

Mr. DuBois: The intended showing on that affidavit was to the effect that this defendant Royal Indemnity has had [29] knowledge for a considerable period of time, of substantially four years. If I understand Mr. Callaway correctly, this morning in oral argument I believe he said he admitted personal knowledge of the existence of the default judgment sometime in the latter part of '46. Now, the affidavit tends to show there was a sheriff's keeper in the business, place of business of the defendant Richardson, on a writ of execution, from February 19, 1947, until October 1, 1947. It also tends to show that there was a recording of an abstract of judgment, which is annexed as an exhibit, on September 18, 1946, which plaintiff would

urge would be constructive notice, both to the defendant Richardson and to the defendant Royal. And there also is the showing of the Department of Motor Vehicles of the State that there was a suspension of driver's license. So that we say, based on those facts, which I believe were uncontrovertible, that as to both defendant Royal and defendant Richardson there was some knowledge as early as 1946, in the fall, and actual knowledge in the early part of '47, so that, both as to defendant Royal and defendant Richardson, they cannot at this time in this court come in on a motion to vacate a default, and I think the authorities that we have cited, the California substantive and procedural treatment of this proposition, amply support that proposition.

In fact, I am wondering whether counsel in making this motion today is in effect making a special appearance for [30] defendant Richardson in trying to get this modified.

I assume that the record is correct and he is only appearing for the defendant Royal. But it is my understanding of the California authorities that the only person that can attack this judgment is the defendant Richardson in the Superior Court, where the control of this particular judgment lies, or on appeal, and there are two remedies suggested, as I read the record, either a motion to vacate under 473(a), or an independent suit in equity. But an examination of the authorities indicates that there must be certain things which can be shown before even that remedy would be available.

We are urging the proposition that under the

facts that seem to be conceded, that where there is in existence actual knowledge on the part of the moving party, and a substantial lapse of time, there are cases cited ranging anywhere from eleven months to two years, and absent the element of fraud, that under those circumstances, keeping in mind and coupling it with the assumption of actual knowledge that under such circumstances such a motion cannot successfully be made, and there is one citation in the points and authorities that even as to the independent suit in equity there must be a showing on the part of the moving party that there is, first, a good and meritorious defense. There is no such showing here. There must be a showing that the result would be different if a new trial were granted upon the vacating of the [31] default. There must be a lot of elements shown, none of which exist here.

This motion is not made by defendant Richardson, and that is why I asked counsel the question, who is, in fact, the moving party here?

There is one case that is cited, and I think it is probably interesting enough to specifically call attention to it, that appears on page 16 of the plaintiff's memorandum of points and authorities. This is talking about the equity side of the Superior Court. It is a recent case, 83 Cal. App. 2d, *Young v. Baker*:

“The bare allegation that the summons and complaint were not served * * * without the averment of facts showing that she had a meritorious defense * * * is insufficient to state a cause of action.”

It would be my contention that if those cases are applicable it would be difficult for this moving party, or defendant Richardson, at this late date, in the face of actual knowledge, to go into equity in the Superior Court and be able to stay in court on the statement of the complaint, statement of the cause of action.

But, in any event, there must be these other showings of diligence, and the attempts to relieve themselves, and the bringing of relief, there must be a freedom from fault on the part of the moving party. [32]

The California Supreme Court has, I think, rather in point, ruled on a similar proposition. That appears on page 6 of our memorandum, and I have directly quoted it, in *Smith v. Jones*:

“Undoubtedly, though it appear from the record of a judgment entered upon a default that service was made upon a defendant, and hence a judgment against him is valid upon its face, it is well settled that such a judgment may be set aside by motion * * * under section 473 of the Code of Civil Procedure * * * But in order to invoke the power of the court to set a judgment aside on the ground that it was entered against a party defendant without service of process against him at all, the motion must be made at a reasonable time or the right to make it is lost * * *”

I think the cases are clear that there must be an equitable showing to minimize laches, to show diligence and good faith, and he must proceed

promptly and he must show that a different result would attach, and he must show—one case here holds, and I have quoted it at length, he must show some disposition of liability other than what was found would result.

The Court: You bring this action against the insurance company by virtue of California statute, don't you? [33]

Mr. DuBois: There is an Insurance Code section——

The Court: I thought there was a statute in the general laws of California that after you have recovered a judgment against an assured, and he didn't pay, you could then bring a suit against the insurance company.

Mr. DuBois: I think that is not in the general laws, your Honor, but rather in the Insurance Code, which, as I recall, is 11580, which provides in the event an insured doesn't pay after judgment, then the judgment creditor is entitled to sue direct.

The Court: Is there any language in there about being bound by the judgment in the state court?

Mr. DuBois: Yes, there is, that is what I was trying to answer your question. You say, are we suing under a state statute? Probably that answer is compound: Yes, under that Section 11580, and also under the provision of the typewritten endorsement on the policy, which says—and I am sure the court is familiar with it, but the substance is: “We agree to pay the amount of any final judgment rendered against an assured.”

I think, to be as specific as I can, we are suing

both on the contract and under the effect of that state statute.

The Court: If you are right in some of your contentions, wouldn't your position be that what the defendant should do in this case would be to go in the state court and get that [34] judgment set aside and vacated?

Mr. DuBois: That is correct.

The Court: Before they presented the matter here?

Mr. DuBois: That is correct, that is our proposition.

The Court: Have you argued that in your brief?

Mr. DuBois: Yes, I have.

The Court: Where?

Mr. DuBois: On the proposition that they can't proceed in this court at this time, it is not the proper forum, they haven't brought it within due time, they have remedies under the cases I have cited in the state court to attack in that fashion, which they haven't done. There is no showing here of anything excepting the insurer moving to vacate the effect of a state court judgment, which I have taken up under the proposition that they cannot collaterally attack a state court judgment.

A trial court of general jurisdiction, as I understand the cases—and they are cited in the memorandum—cannot attack, modify, impeach, or vary the effect of a judgment that is final in another trial court of general jurisdiction. It must be a direct attack in that court.

The Court: Let's go to this matter of property

damage. Where do you find any support for any recovery for property damage?

Mr. DuBois: Under the doctrine of cases that start [35] about 28 Cal. 2d, *Hunt v. Authier*, your Honor, which are relatively recent, which, in effect, as I tried to understand that opinion, constitutes case precedence for what apparently had been something in the nature of the common law before that time. *Hunt v. Authier* has been subsequently followed in a number of cases which are cited in our closing memorandum of points and authorities, and counsel now is saying——

The Court: Just a moment. You say your closing points and authorities?

Mr. DuBois: Yes, about the last page of the plaintiff's closing memorandum of points and authorities in support of the motion for summary judgment. There are a number of cases cited there.

The Court: I don't seem to find any closing memorandum by the plaintiff.

Mr. DuBois: I will be able to give you the exact page.

The Clerk: On the summary judgment motion, your Honor.

The Court: Where does it appear in that memorandum?

Mr. DuBois: I will give you the page and line in just one moment, your Honor.

It is the opening memorandum, your Honor, and it is page 28. It is the one filed on or about February 15th. The last page of that opening memo-

randum, citing *Moffat v. Smith and Fields v. Michael*.

The Court: What is the theory of those cases? Tell me [36] about them.

Mr. DuBois: The theory is, for the first time we have case law that seems to say, and a lot of counsel have argued this back and forth, and I think the consensus is that the type of damage that we have here, where there is a wasting or diminution of the estate of the judgment creditor that is the result of certain negligence or certain tortious conduct on the part of the defendant, that instead of being considered, as counsel has designated, as special damage, so long as it impairs the estate it is considered property damage.

Counsel has relied on his citation of *Cort v. Steene* in his memorandum in support of the motion today, and I think counsel would probably concede, if he examines the record, that the Supreme Court of the State of California has granted a petition for hearing only within the last month.

The Court: What is the citation of that case?

Mr. DuBois: *Cort v. Steene*, your Honor, appears——

Mr. Callaway: Page 11 it appears.

Mr. Lopardo: 95 Advance Cal. App. 968.

Mr. DuBois: Page 11 of their memorandum, your Honor, the top line.

So that that entire opinion is set at large again by the granting of the hearing. We are back on the same proposition. *Hunt v. Authier*, *Moffat v. Smith*,

Fields v. Michael, still remain the law of the Supreme Court cases starting at [37] 28 Cal. 2d.

I think that would answer, probably, the proposition that the court has in mind as to what about the element of property damage. That is about the only answer that we have for it. The opinion of Cort v. Steene, on which they apparently rely, is not before us.

The Court: What is your view on the matter of a credit of the \$3,500.00? Supposing, for instance, that plaintiff had recovered a judgment against Blodgett's for \$31,000.00, and one against Richardson for \$31,000.00, you couldn't have had two satisfactions.

Mr. DuBois: The policy provides, in substance, that defendant Royal will pay on behalf of its insured certain sums of money. There is the language of the policy that says the named insured is an assured. It says a permittee is an assured. I don't have any bay horse case that I can at the moment cite to the court as to what is the proposition as far as any controlling authority is concerned.

I think the language of the policy is clear that if there is a judgment against each of two, a named and an additional insured, the company's liability under the terms of its contract would be to pay the amount within the policy of that judgment.

The Court: As to each?

Mr. DuBois: The language of the policy, I think, says [38] it will pay on behalf of its assured. I will have to answer that yes. If they have two kinds of liability, as we contend they have here, they

have statutory liability under 402 of the Vehicle Code, and they have a common-law negligence liability, two different types, then I think the amount that is due under the policy would be that amount that is within the policy limits for each of the assureds, additional or named.

The Court: Regardless of how the insurance was split up, the fact remains that Blodgett's liability was that of owner, Richardson's was that of the driver, is that it?

Mr. DuBois: That is correct.

The Court: It may be that there is a different reason for there being insurance for Richardson. But actually it is a simple case of an owner and a driver.

Mr. DuBois: That is correct. If I can anticipate a court's question as to what is to be the treatment of this \$3,500.00, I think the most direct answer would be the correspondence that is included in my affidavit in opposition, showing how the parties treated it.

The Court: Those letters between yourself and Mr. Callaway, were those letters put into evidence?

Mr. DuBois: No. But I have them here, your Honor.

The Court: At the motion for summary judgment?

Mr. DuBois: No, they were not. The issue wasn't raised until the reply memorandum of Royal came in, and then they say [39] there can't be but one judgment, "We have already paid you \$3,500.00, so we don't owe you this much."

The Court: Is there any dispute, Mr. Callaway, that those two letters, as set forth in counsel's affidavit, rather, I think they are set forth—are they included in the affidavit?

Mr. DuBois: No; they are excerpted in the affidavit.

The Court: Your affidavit?

Mr. DuBois: Yes.

The Court: Is there any dispute that those letters were sent and received?

Mr. Callaway: No, your Honor.

The Court: Is there any objection to making them part of the record in this case?

Mr. Callaway: I think they already are.

The Court: How?

Mr. Callaway: By excerpts in the affidavit.

The Court: I am going to receive them in evidence by reference in connection with the hearing of this motion that has been made by the defendant.

Mr. Clerk, do you want to give them any kind of a number, or will that be sufficient?

The Clerk: I think they are part of the record as part of the affidavit.

Mr. DuBois: If your Honor wants the letters, I can file [40] them. I don't have them with me, but I can get them and turn them in to the court.

The Clerk: If you just order that the affidavit be deemed part of the record, and all of its contents, that would cover it.

Mr. DuBois: They are quoted directly at page 5 of my affidavit, bottom of page 4 and top of page 5 of my affidavit.

The Clerk: They are just quoted, your Honor; they are not exact copies of the letters.

Mr. DuBois: May I proceed, your Honor?

The Court: All right.

Mr. DuBois: If the question as to the intent of the parties is any test, we also have the same counsel approving the form of the judgment, the satisfaction of the judgment, which we set out in this affidavit of mine in support of the motion at page 4, that \$3,500.00 paid by defendant Royal in that Superior Court case is to be paid to satisfy plaintiff's judgment against Blodgett's. And the words "said judgment" appear very distinctly both in the form I have quoted in the same affidavit on page 4, the exact language, that appears both on the form of the judgment and on the form of the satisfaction. There never has been any question until within the last short time, namely, counsel's memorandum in opposition to the motion for summary judgment, that that issue even existed. They are now contending for the first time that [41] \$3,500.00 is referable. We say if that be true there is a judgment for \$31,000.00 against the additional insured, let that \$3,500.00 come off of the top of the liability, the top of the judgment, and it does not apply—the first \$3,500.00—toward calculating their liability under the contract. They have paid on account of the statutory liability of the owner.

The biggest point, I think, that plaintiff can make is that this Superior Court judgment, in the pleadings, and its legal effect, as I get the authorities, is that it is a final judgment valid on its face,

and it cannot be collaterally attacked. If attacked collaterally, it is only open to the judgment roll. The cases are many. I have annexed to my affidavit the photostatic copy of the original summons and return of service, which for this proposition would constitute the judgment roll. If a collateral attack is attempted, the only consideration that can be given in a collateral court on a collateral attack is the examination of the judgment roll. If the judgment is valid on its face, then those records, such as the exhibit that I have annexed to my affidavit, as I understand the cases—and the cases are many, and they are excerpted at length in the memorandum, too—those records are conclusively presumed to be correct and no extraneous evidence can be submitted in opposition to the effect of those court records. [42]

To try to answer, and I think we can successfully, some of the questions of the court. Counsel did not, while the proposed findings and conclusions were under submission, file any objections thereto under the rule. The court has said it has three questions, namely, service of process, which I think is answered by the citations that are contained in our proposition that there cannot be a collateral examination or a collateral attack in this court at this time; the question of definition of property damage under the terms of the policy, I think *Cort v. Steene*, has been answered. \$3,500.00 credit on the account paid by defendant Royal for Blodgett's, I think has been answered. But the court had a few other questions in subsequent argument, which

suggests an interruption in my thinking for a moment.

The court has at several times asked in chambers, when counsel was present, and I think here, too, what did counsel contend is the conceding—the proposition under which the compulsory insurance aspect is conceded. I wanted to mention this one citation that I think answers that proposition, by way of momentary diversion, contained on page 20 of our reply memorandum, that under the treatment that this defendant insurer has given to our allegations, that this policy is compulsory and that that is foreclosed at this time. The case of *Merchants Indemnity v. Peterson*, Third Circuit, 113 Fed. 2d 4, I think that forever and all time will eliminate [43] that issue as to its compulsory aspects.

Now to get back to the questions of the court. One question that seemed to have the greatest significance to the court was, what could the insurer have done to avoid this condition that the insurer contends is iniquitous?

And if I might answer that question that the court put to counsel, I would suggest that the insurer interplead.

It will be recalled, if the court remembers our earlier authorities, that there were several cases that say that under this type of circumstances there are several things which an insurer can do. First, it can defend. In fact, it has the duty to defend. There is one whole paragraph on duty to defend under federal citations. It has the opportunity to defend. It has the opportunity to tender to the

insured the amount of its policy limits if the claim is for more than the amount of the policy, if plaintiff's claim is more than the amount of the policy. It can tender that amount to the insured and leave him at his own defense to defend. And I think that question could be answered in that fashion.

The Court: Do you mean to say that they can defend in the name of the insured without his consent?

Mr. DuBois: The citations are quite at length, your Honor, and if the court is interested I will point out——

The Court: Where do they appear?

Mr. DuBois: The page of the memorandum where that very [44] proposition is discussed, the bottom of page 21 of the plaintiff's closing memorandum of points and authorities.

The Court: On the motion for summary judgment?

Mr. DuBois: That is correct. Those are papers filed on the 15th of March. Page 21 and continuing under roman numeral VIII through the balance of page 22.

One other fact that seems significant, and that is that in the defendant's answer to plaintiff's interrogatories—these are the ones that were served on me on April 7, 1950, long before the case was actually decided—there is a statement on page 2, admission No. 10, line 23, that even at that date before the decision this defendant knew then and took the position that there had not been any

service of process on defendant Richardson in the Superior Court matter.

Examination of the filing date on that paper will show that at that date that was their position then.

The Court: Counsel, there is one other thing I would like to have you do for me. I am going to take these matters under submission and give them a little study. On defendant's motion for a new trial, to set aside the judgment, and brief in support thereof, filed May 5, 1950, beginning on page 2, line 7——

Mr. DuBois: Of their motion, your Honor?

The Court: Yes. Point 4, "It was error for the court to make the following findings of fact:" then defendant raises [45] questions as to certain findings by (a), (b), and on down through (1).

Mr. DuBois: On page 6?

The Court: (1) on page 6 is the last one of those findings that they object to.

Now, in passing on this motion for summary judgment I went through the pleadings to see whether or not there were issues of fact, and because of the admissions made, most of the issues, except legal issues, were fairly well disposed of, except in one or two instances I found further admissions in, I believe it was, the admissions of the defendant filed in this case to your request for admissions. I would like to have you go through, by memorandum, and cite me as to each one of those subdivisions (a) to (1), where an attack is made on the findings, as to where support is found

for those findings, either in the allegations of the complaint which are admitted, or in the admissions of the parties, or the answers to interrogatories, or whatever place support is found for them. It doesn't have to be lengthy. In fact, the briefer the better. Finding (a), and in two or three lines you could cite me where support is found for that.

Mr. DuBois: Very easily.

The Court: I want to test whether or not those findings are supported.

Mr. DuBois: May I say one thing in conclusion, your [46] Honor? If the court has any consideration for a vacating of the summary judgment for purposes of a new trial, there are authorities contained at page 13 of our memorandum——

The Court: On terms?

Mr. DuBois: On terms imposed by the court, yes, and I would like to have the court consider those terms. It is apparently a conditional vacating until a subsequent trial on the merits. There are certain impositions of the court properly placed against the moving party, and I would suggest to the court that, assuming now that defendant Royal had appeared for defendant Richardson in the Superior Court and made unnecessary this lengthy proceeding and the amount of work that has been done, then the plaintiff would request the court's taking evidence on value and nature of the claim for plaintiff's account, if that is one of the terms, and we would request that it would be. And if any vacating is done, it would seem to me that under any of the positions taken by defendant Royal that

it could be done, I am not certainly conceding that it should, but if it is done I think it could be taken just on the one issue of actual service of process. It is a simple, limited, special issue.

The Court: I am going to take your various motions under submission, including the motion to file an amendment.

I still think there are the three questions that I previously stated to be determined. I am inclined to feel that [47] the defendant is a little dilatory in raising this question of service. I still have the feeling that it almost looks like there was a good old sail in the wind that was held back until you found out which way the cat jumped, and then the card is brought out.

I say that for the reason that on March 15th you knew where Richardson was. The motion for summary judgment was set for hearing on April 3rd, and it wasn't decided until April 11th. Then findings were not entered up and the order of judgment not made until the latter part of April. Of course I know that counsel is busy. On the other hand, I don't know that it was necessary to send a lawyer to interview Richardson on factual matter. You had an investigator working on the job.

Anyhow, there are a number of questions that center around this allegation of lack of service.

One other suggestion, and that is we were discussing what might an insurance company have done had they found out that their insured—and I mean an insured in the status of Richardson, a man whom they had no contractual relations with

—had not actually been served and had not come to them and they couldn't find him. Let me back up, let's put it this way. Supposing that there was some question that arose as to whether or not Richardson had been served, and it became apparent to the insurance company that a default had [48] been taken against him, and possibly a default judgment, some question of fact as to whether or not he actually had been served with process within the six months period, so that the insurance company would still have had time to turn around and make its motions in the state court, would it not have been possible for the insurance carrier to have commenced a declaratory relief action with the plaintiff Olmstead in a court, for instance, the federal court, and allege that a dispute of fact existed as to whether or not Richardson had been served, that if Richardson had been served, the insurance company might be bound by what transpired, if he hadn't been served, the insurance company wanted a chance to set that default aside and set that judgment aside as a void judgment—why couldn't that matter have been litigated out at that time in '46 or early '47, instead of now on a motion after a judgment has been entered?

Mr. Callaway: Your Honor, the first time that I discovered or knew that there was a default and a judgment, if you want me to give you the exact date, was on the 17th of April, 1947. That was when I went into court to stipulate to judgment as against Blodgett's, at which time Mr. Olmstead's brother, who was an attorney, said to me, "Would

you waive any right of subrogation as against Richardson?" I said, "Of course I will. We can't find him." In other words, as you know, an owner has a right to recover over and against [49] the driver where they pay out any money. So the sole object of the letter which I wrote, a copy of which I still have, was to comply with that request. We thought it would be fruitless to go after Richardson. At that time we went up to court I discovered for the first time that a judgment had been entered against Mr. Richardson for some \$31,000.00.

The Court: But you were then still within your year period if you claimed there had been no service.

Mr. Callaway: I didn't move for two reasons. As a matter of fact, I didn't at that time question service on him. I had no reason to. I had no knowledge of the fact. So there wasn't anything to make me suspicious about it at all. But what I did do is that I felt and relied upon the fact that he was required to comply with the terms of the policy in order to benefit from the insurance, by at least notifying us that he had been sued, and that if he didn't do that, then we didn't owe him a defense anyway. That comes up all the time. In other words, I take the position—I am not trying to re-argue it—that since this happened beyond the boundaries of Pasadena, that compulsory feature was not involved.

The Court: That is a nice question of law.

Mr. Callaway: But that is the reason, if you want to know why we didn't even attempt to do anything. We felt, if a man didn't care any more

about his own affairs than to not [50] ask us to do that which we would readily have done, which he was entitled to under certain circumstances, we didn't owe him anything.

I think, if the Court please, you have asked counsel to do something for you that will be enlightening. There are other issues of fact there which the court has found on, and there is no basis for the court to so find——

The Court: In addition to those that you have listed (a) to (1)?

Mr. Callaway: Yes. Getting back to whether the \$3,500.00 should be credited, and so forth, your Honor, that is just a plain construction of the very contract we are being sued on, and that particular type of contract is used by all the insurance companies, so if it is not right, that means, where two people are sued instead of one, that in every instance you double, you might say, the amount of insurance that people carry. The policy is in evidence. The amount of the coverage——

The Court: If it wasn't for your letters exchanged between you gentlemen, I don't think there would be much of a problem there.

Mr. Callaway: What does the letter say, your Honor? The letter says this—I have a copy of it right in front of me. My letter says, "Pursuant to your suggestion"—I didn't tell you one other thing. The draft that we got to pay this [51] \$3,500.00, through force of habit, says "dismissal with prejudice." We knew the suit was in satisfaction of judgment, so I told Mr. Olmstead that that was

not the intent of it, and this is my letter: "Pursuant to your suggestion, this is to advise that although the draft of the Royal Indemnity Company payable to George N. Olmstead and Alford P. Olmstead, his guardian ad litem, and H. C. Velpman, stated on its face, 'Dismissal with prejudice Superior Court action 516890,' this was actually in satisfaction of judgment of the above-numbered case insofar as the defendant Roy Jordan, executor for the estate of Harry E. Blodgett, deceased, and as Testamentary Trustee under the Last Will and Testament of Harry E. Blodgett, deceased, and not otherwise.

"I am authorized on behalf of my principal, the Royal Indemnity Company, to waive any right of subrogation against the co-defendant Sam G. Richardson."

The Court: Why did you think that Mr. Olmstead was interested in whether or not you waived your right of subrogation against Richardson?

Mr. Callaway: He asked me to.

The Court: He is not representing Richardson, why should he care whether you waived your right of subrogation against Richardson?

Mr. Callaway: Because if Richardson had any money—and they assumed that I assumed if he had any it was very little—they [52] didn't want us to go out and grab any. We said we won't pursue our claim for the \$3,500.00.

The Court: That assumes, then, that you knew they were going to try to recover on the rest of that judgment.

Mr. Callaway: I knew they had a judgment on that date, I just got through telling you, on April 17, 1947, for the first time I knew that they had a judgment against Richardson for \$31,000.00. I didn't think Royal was responsible for it. If they could collect it from Richardson, it was all right with me.

The Court: How much time do you want, Mr. DuBois, to send that memorandum in to support those findings?

Mr. DuBois: I heard your Honor say that you wanted to leave by the end of the month. I would like to have about ten days.

Mr. Callaway: Is there a stay of execution in this case?

Mr. DuBois: I haven't applied for a writ.

Mr. Callaway: I would like the court to make an order granting us a stay of execution for ten days after the court has ruled on this motion.

The Court: I don't see any reason why that shouldn't be done.

Mr. DuBois: I would be willing to stipulate to it.

The Court: That order will be made. How about a week? You ought to be able, as familiar as you are, you ought to be [53] able to dictate that memorandum that I have asked for in 20 minutes time. Mr. Callaway may want to answer.

Mr. DuBois: I will do it.

The Court: I am not going to give you even a week. If you want to submit a memorandum on that, I want it in here by Thursday, May 18th.

And, Mr. Callaway, if he wants to file any answer, may have one filed by Tuesday, May 23rd.

Counsel, I am not talking about any more law; I am just talking about these findings. "The finding that is attacked in that subdivision (a) finds support in paragraph VI of the complaint, which is admitted," and so forth, "in admission No. 3 to our request for admissions, in the answer of the defendant to interrogatory No. 7."

Mr. DuBois: I have given the court all the law I could find, anyway.

The Court: The matter will stand submitted.

(Whereupon, at 12:10 o'clock p.m., Monday, May 15, 1950, the matter was submitted.) [54]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 7th day of September, A.D. 1950.

/s/ SAMUEL GOLDSTEIN,
Official Reporter.

[Endorsed]: Filed September 15, 1950.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 207, inclusive, contain the original Petition for Removal to Federal Court; Amended Complaint for Money Due on Contract; Answer to Amended Complaint; Plaintiff's Request for Admissions; Plaintiff's Motion to Strike Portions of Defendant's Answer to Amended Complaint and for Summary Judgment on the Pleadings; Plaintiff's Interrogatories; Answers to Plaintiff's Interrogatories; Answers to Plaintiff's Request for Admissions; Motion for Leave to File Amendment to Answer; Amendment to Answer; Order; Findings of Fact and Conclusions of Law; Judgment; Motion for New Trial and to Set Aside Judgment and Brief in Support Thereof; Statement of Reasons in Opposition to Motion; Memorandum—Findings of Fact Supported by; Memorandum Decision; Modified Finding of Fact and Conclusion of Law; Judgment; Supersedeas Bond; Notice of Appeal; Designation of Record on Appeal; Plaintiff's Designation of Record on Appeal and Application and Order for Extension of Time to File the Record and Docket Appeal and full, true and correct copies of minute orders entered May 22, 1950, and June 26, 1950, which, together with original reporter's transcript of proceedings on April 3, 1950, and May 15, 1950, transmitted herewith,

constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.40 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 18th day of September, A.D. 1950.

EDMUND L. SMITH,
Clerk.

[Seal] By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 12691. United States Court of Appeals for the Ninth Circuit. Royal Indemnity Company, a Corporation, Appellant, vs. George N. Olmstead, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: September 21, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals
Ninth District

No. 12691

ROYAL INDEMNITY COMPANY, a Corporation,
Appellant.

vs.

GEORGE N. OLMSTEAD,
Appellee.

STATEMENT OF POINTS ON APPEAL

Comes Now the appellant Royal Indemnity Company, a corporation, and states that the points which it intends to rely on for appeal are as follows:

1. It was error for the trial court to deny appellant's motion to amend answer;

2. It was error for the trial court to strike a portion of appellant's answer;

3. It was error for the trial court to grant a summary judgment in favor of appellee;

4. It was error for the court to grant a judgment based on an invalid judgment obtained in the State Court.

TRIPP & CALLAWAY,

By /s/ HULEN C. CALLAWAY,
Attorneys for Appellant.

Receipt of Copy acknowledged.

[Endorsed]: Filed September 30, 1950.

United States Court of Appeals
Ninth Circuit

No. 12691

ROYAL INDEMNITY COMPANY, a Corporation,
Appellant,

vs.

GEORGE N. OLMSTEAD,

Appellee.

STIPULATION

It is herein and hereby stipulated by and between Royal Indemnity Company, a corporation, Appellant, and George N. Olmstead, Appellee, by their respective attorneys of record as follows:

1. That to eliminate uncertainty in designating portions of the record to be printed as part of the record on appeal, this stipulation, to the extent that it can be used under Federal Civil Rules on Appeal, designate in the United States Court of Appeals certain portions of certain documents heretofore in the United States District Court designated as Plaintiff's and Appellee's Designation of Record on Appeal;

(a) That the excerpts of the Municipal Ordinance of the City of Pasadena as contained at page 17 lines 2-32, page 18 lines 1-32, page 19 lines 1-32, and page 20 line 1-24 of Plaintiff's Points and Authorities as annexed to Plaintiff's Motion to Strike Portions of Defendant's Answer to the Amended Complaint, for Summary Judgment on

the Pleadings, which documents are dated, served and filed February 15, 1950, and

(b) The Counter Affidavit of C. Paul DuBois dated May 10, 1950; the Affidavit of Deputy Sheriff R. W. Carter dated May 9, 1950; the certified copy of the California Department of Motor Vehicles' Order of Suspension dated February 7, 1947, which said certified copy of Order was the substituted exhibit filed about May 17, 1950, by order of Court in place and in lieu of a copy of the Order of Suspension as originally filed, and certified copy of the recorded Abstract of Judgment dated September 18, 1946, in the Superior Court of the State of California in and for the County of Los Angeles, and recorded September 18, 1946, in the office of the Recorder of Los Angeles County, which said documents are exhibits as annexed to Plaintiff's Memorandum of Points and Authorities in Opposition to Defendant's Motion for New Trial and to Set Aside Judgment and Order to File Amendment to Answer, which said memorandum is dated May 10, 1950, and was served and filed on said date;

2. That the remainder, save and excepting those documents hereinabove described, of plaintiff's memoranda of points and authorities dated Feb. 15, 1950, and May 10, 1950, and served and filed on said dates may be disregarded in the printing of the record on appeal.

Dated this 29th day of September, 1950.

TRIPP & CALLAWAY,

By /s/ HULEN C. CALLAWAY,
Attorneys for Appellant.

/s/ C. PAUL DuBOIS,
Attorney for Appellee.

[Endorsed]: Filed October 4, 1950.

No. 12691

United States
Court of Appeals
for the Ninth Circuit.

ROYAL INDEMNITY COMPANY, a Corpora-
tion,

Appellant,

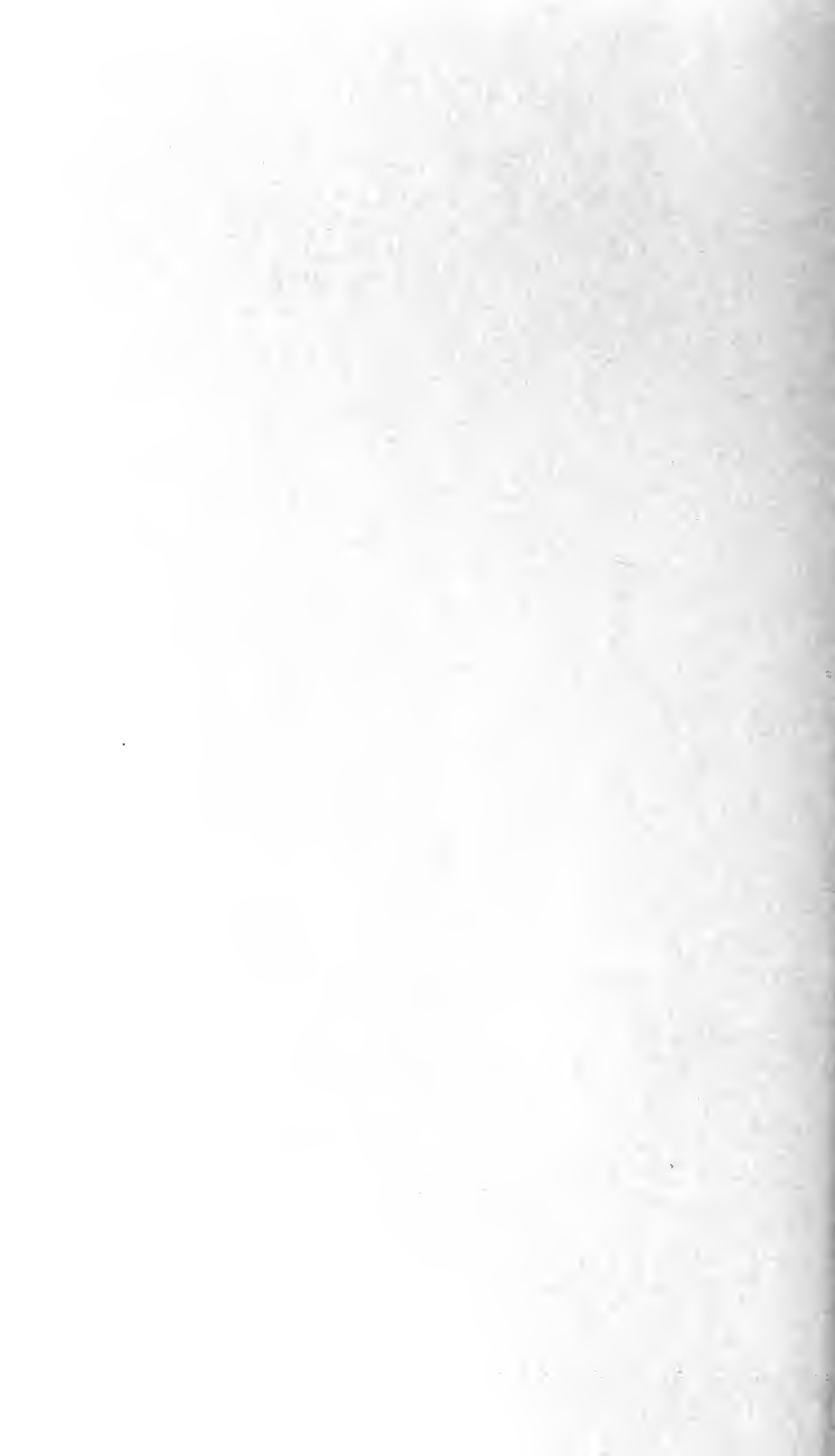
vs.

GEORGE N. OLMSTEAD,

Appellee.

SUPPLEMENTAL
Transcript of Record

Appeal from the United States District Court,
Southern District of California,
Central Division.



No. 12691

United States
Court of Appeals
for the Ninth Circuit.

ROYAL INDEMNITY COMPANY, a Corpora-
tion,

Appellant,

vs.

GEORGE N. OLMSTEAD,

Appellee.

SUPPLEMENTAL
Transcript of Record

Appeal from the United States District Court,
Southern District of California,
Central Division.



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Points and Authorities in Support of
Plaintiff's Motion

* * *

ORDINANCE NO. 3041, CITY OF PASADENA

The Answer to Plaintiff's Amended Complaint Does not Deny the Allegations, and All of Them, Contained in Plaintiff's Paragraph VII.

A. Ordinance No. 3041 as amended to November 1, 1945, of the City of Pasadena, a municipal corporation, organized as a charter city provides:

"An Ordinance of the City of Pasadena Regulating the Operation of Certain Motor Propelled Vehicles, Drive-Yourself Vehicles, Vehicles Transporting Passengers for Compensation or for Sight-Seeing Purposes Upon the Public Streets and Prescribing Penalties for the Violation Thereof."

"The Board of Directors of the City of Pasadena ordains as follows:

"Section 1. Definitions: Whenever in this ordinance the following terms are used they shall have the meaning respectively ascribed to them in this section.

"(b) Owner: A person, firm, association, or corporation other than a driver, who or which owns, controls or directs the use of a taxicab, for-hire automobile or sightseeing automobile, or who or which owns, controls, rents, leases or otherwise allows or permits the operation or use of any drive-yourself vehicle.

"(c) Driver: A person in direct and immediate possession or charge of, driving, or operating a

taxicab, for-hire automobile, or sightseeing automobile.

“(h) Drive-Yourself Vehicle: A motor propelled passenger vehicle or truck, other than the vehicles defined in this section, which is operated or used in the City of Pasadena, and which the owner for a consideration rents or leases to or allows or permits the operation or use by, a person, firm, corporation, or association, who or which directs and controls the operation and use of and furnishes the driver for said vehicle or truck, or who or which pays a separate consideration for the services of said driver.

“Section 2. It shall be unlawful for any person, firm, association, or corporation to operate or cause to be operated at any point in the City of Pasadena any taxicab, for-hire automobile, or sightseeing automobile unless there shall be issued by the City of Pasadena an owner's permit to the owner, and unless each such permit shall be in full force and effect

“(a) It shall be unlawful for any person, firm, association, or corporation to rent, lease or allow or permit the operation or use of any drive-yourself vehicle in the City of Pasadena unless and until the owner thereof shall have been and is the holder of a valid and subsisting permit by the City of Pasadena as provided in this ordinance.

“Section 4. Owner's Permit to Operate For-Hire Automobiles and Sightseeing Automobiles:

“(a) Any person, firm, association, or corpora-

tion may apply to the City of Pasadena for a permit to operate for-hire automobiles upon the streets of the City of Pasadena by filing with the City Manager of the City of Pasadena, upon forms to be supplied by the City of Pasadena, without charge to the applicant, an application setting forth the name and address of the applicant and the nature of liability insurance covering each for-hire automobile and/or each sightseeing automobile and the size, location and wording of signs to be used on the for-hire automobiles

“(b) The City Manager of the City of Pasadena shall issue a permit without charge to all applicants for a permit to operate a for-hire automobile over the streets of the City of Pasadena, which shall be in full force and effect until the holder thereof shall violate any of the provisions of this ordinance but in no event to be for a period of more than one year from the date of issuance thereof; provided that the application therefor shall set forth and satisfactory proof shall be made to the City Manager that the following facts and acts either exist and have been performed or that they will exist and will be performed before the privileges granted by the permit shall be exercised:

“(c) Owner’s Permit, Drive-Yourself Vehicle: Any person, firm, association, or corporation may apply to the City of Pasadena for a permit to rent, lease or allow or permit the operation or use of any drive-yourself vehicle upon the streets of the City of Pasadena, by filing with the City Manager of the

City of Pasadena, upon forms to be supplied by said City without charge to the applicant, an application which shall state:

“(1) The name of applicant. If applicant be a corporation, the names of the officers thereof and the location of its principal place of business, or if a firm or association the members of such firm or association and their residence address shall be set forth.

“(2) The residence address of applicant.

“(3) The address of the place or places where such business is to be transacted.

“(4) The number of cars to be used in applicant's business, together with the make, type, motor and serial numbers, license numbers and the year first sold.

“(5) That the owner has secured and paid in advance the annual premium upon an insurance policy whereby the insurer agrees to be liable for death of or injury to any person resulting from negligence in the operation of any such drive-yourself vehicle by any person using and operating the same with the permission, express or implied, of such owner. Except as hereinafter provided, the liability of such insurer as provided in such policy shall be not less than \$15,000 for personal injuries to one person, and \$30,000 for personal injuries resulting to two or more persons in any one accident; said insurance policy shall contain an endorse-

ment to provide that said insurance policy will not be cancelled by the insurer or at the request of the insured, until the City of Pasadena, c/o of City Manager, City Hall, Pasadena, California, shall have notice in writing at least 10 days immediately prior to the time when such cancellation shall become effective; provided however, that said policy shall be deemed to comply with the provisions of this subsection in the event one policy is filed as herein provided to cover the minimum amounts of liability on any and all drive-yourself vehicles rented, leased, operated or used in the City of Pasadena by any one owner; The insurance policy required by this subdivision shall provide that suit may be maintained against the insurer by any person injured under the circumstances mentioned in this subdivision.” (Emphasis ours.)

“Section 19. The City Clerk shall certify to the adoption of this ordinance and cause the same to be published once in The Pasadena Star-News.

“I hereby certify that the foregoing ordinance was adopted by the Board of Directors of the City of Pasadena Bessie Chamberlain, City Clerk of the City of Pasadena.”

[Endorsed]: Filed February 15, 1950.

EXHIBIT No. 2

In the Superior Court of the State of California
In and for the County of Los Angeles
No. 516890

GEORGE N. OLMSTEAD, by ALFORD P.
OLMSTEAD, his Guardian ad Litem,

Plaintiff,

vs.

SAM G. RICHARDSON, ROY JORDAN, etc.,
et al.

Defendants.

ABSTRACT OF JUDGMENT

I certify that in the above-entitled action and Court, on the 13th day of September, 1946, Judgment was entered in Judgment Book 1703, Page 127, in favor of George N. Olmstead, by Alford P. Olmstead, his guardian ad Litem, and against Sam G. Richardson.

That plaintiff George N. Olmstead, by Alford P. Olmstead, his guardian ad Litem, do have and recover from defendant Sam G. Richardson the sum of \$31,000, together with interest thereon at the rate of 7% per annum from September 12, 1946, until paid, and for plaintiff's costs and disbursements amounting to the sum of \$14.00 for \$..... Principal, \$..... Interest, \$..... Attorney fee, and \$..... Costs.

Attested this 18th day of September, 1946.

J. F. MORONEY,
County Clerk,

[Seal] By /s/ G. HALL,
Deputy.

Recorded Sept. 18, 1946, 45 min. past 3 p.m. in
Book 23605 at Page 86 of Official Records, County
of Los Angeles, State of California. Recorded at
Request of Attorney.

MAME B. BEATTY,
County Recorder.

By /s/ T.
Deputy Recorder.

#22

Dl. To: Alford P. Olmstead,
510 S. Spring St.,
Los Angeles 13.

[Endorsed]: No. 12691. United States Court of Appeals for the Ninth Circuit. Royal Indemnity Company, a Corporation, Appellant, vs. George N. Olmstead, Appellee. Supplemental Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: September 21, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

No. 12691

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ROYAL INDEMNITY COMPANY, a corporation,

Appellant,

vs.

GEORGE N. OLMSTEAD,

Appellee.

APPELLANT'S OPENING BRIEF.

TRIPP & CALLAWAY,
935 Van Nuys Building,
Los Angeles 14, California,
Attorneys for Appellant.



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No. 12691

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ROYAL INDEMNITY COMPANY, a corporation,

Appellant,

vs.

GEORGE N. OLMSTEAD,

Appellee.

APPELLANT'S OPENING BRIEF.

Statement of Jurisdiction.

1. The statutory provisions to sustain the jurisdiction of the District Court are U. S. Code, Title 28, Sec. 1332 (formerly the Act of Mar. 3, 1875, Chap. 137, Sec. 1, 18 Stat. 470, as amended; 28 U. S. C. A., Sec. 41(1)) providing that the "district court shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$3,000 . . . and is between: (1) citizens of different states; . . ."

The statutory provisions to sustain the removal of the within case from the State Court to the District Court are U. S. Code, Title 28, 'Sec. 1441(a) (formerly the Act of Mar. 3, 1911, Chap. 231, Secs. 28 and 53, 36 Stats. 1094, 1101; 28 U. S. C. A. Secs. 71 and 114, 1940 Edition) providing that "except as otherwise expressly

provided by Act of Congress, any civil action brought in a state court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the District Court of the United States for the district and division embracing the place where such action is pending.”

2. The existence of the jurisdiction is shown by the following allegations in the affidavit of M. J. Rhew, Manager of the Royal Indemnity Company: “That defendant Royal Indemnity Company is a non-resident of the State of California and is a corporation organized under the laws of the State of New York. That plaintiff was at the time of bringing said suit, and still is, a resident and citizen of the State of California. That the matter and amount in dispute in said suit exceeds, exclusive of interest and costs, the sum of three thousand dollars (\$3,000.00). That the said suit is of a civil nature, namely, an action for breach of contract and the controversy in this action is wholly between citizens of different states.” [R. 3-4.]

3. The statutory provisions to sustain the jurisdiction of the Court of Appeals are U. S. Code, Section 1291 (formerly the Act of Mar. 3, 1891, Chap. 517, Sec. 6, 26 Stat. 828, as amended; 28 U. S. C. A., Sec. 225(a)) providing that the “court of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . ;” and U. S. Code, Section 1294 (formerly the Act of Mar. 3, 1891, *supra*; 28 U. S. C. A., Sec. 225(d)) providing that “appeals from reviewable decisions of the district . . . (1) From a district court of the United States to the court of appeals for the circuit embracing the district; . . .”

STATEMENT OF THE CASE.

Pleadings.

This is an appeal by Royal Indemnity Company, a New York corporation, and the defendant below, from a summary judgment.

On or about the 3rd day of January, 1950 [R. 62] the Appellee George N. Olmstead filed an amended complaint against Royal Indemnity Company, a corporation, in the District Court of the United States, Southern District of California, Central Division, for money purportedly due on an insurance policy.

In the first cause of action of said amended complaint, appellee alleged that:

Prior to April 9, 1946, Harry E. Blodgett did business in the County of Los Angeles, State of California under the fictitious firm name of "Blodgett's Auto Service" or "Blodgett's Auto Service and Tours" in the renting for hire of passenger automobiles or drive-yourself passenger vehicles. [Par. III, Amended Complaint, R. 7.]

On or about February 15, 1946, Harry E. Blodgett died and shortly thereafter Roy R. Jordan was duly appointed the executor of his estate and testamentary trustee under the last will and testament of the said Harry E. Blodgett. [Pars. IV and V, Amended Complaint, R. 7.]

Roy R. Jordan conducted the said business in the City of Pasadena, County of Los Angeles, State of California and rented vehicles in the said City with said vehicles to be used on the public streets of the said City, County and State. [Par. VI, Amended Complaint, R. 8.]

The said business was operated under the terms of the ordinance of the City of Pasadena known as Ordinance No. 3041 entitled "An Ordinance of the City of Pasadena, Regulating the Operation of Certain Motor Propelled Vehicles, Drive-Yourself Vehicles, Vehicles Transporting Passengers for Compensation or for Sightseeing Purposes upon the Public Streets and Prescribing Penalties for the Violation thereof." [Par. VII, Amended Complaint, R. 8.]

Appellee further alleged that:

A written insurance contract, issued by Royal Indemnity Company and dated February 16, 1946, was required by the aforesaid ordinance, and was applied for, and said ordinance was, at all times mentioned herein, a part of the terms, covenants and agreements of said insurance contract. That said contract was caused to be filed with the City of Pasadena. The said City issued a municipal permit under Section 2(a) and 4(c) of said ordinance to the said Blodgett for the conducting of said business. [Par. VII, Amended Complaint, R. 8-9.]

Prior to April 9, 1946, the defendant Royal Indemnity Company entered into a "Comprehensive Liability Policy" with the estate of Harry E. Blodgett and Roy R. Jordan. [Par. VIII, Amended Complaint, R. 9.] (A copy of the said contract was annexed to the said Amended Complaint as Exhibit "A" and was incorporated therein by reference. Exhibit "A" appears on pages 16 to 62 of the Record.)

A Packard automobile was scheduled in said insurance contract and was an asset of the estate of Harry E. Blodgett. [Par. VIII, Amended Complaint, R. 9.]

Said insurance contract provided that said Royal Indemnity Company guaranteed payment to a judgment creditor for that part of said judgment which

is within the amounts expressed in said policy, agreed to and would be liable for damage to property or the injury to any person, agreed with the insured to pay on behalf of the insured all sums which the insured shall become obligated to pay for damages because of bodily injury or injury to or destruction of property sustained by any person caused by accident, and would insure against liability from bodily injury or destruction of property or damage to property or for injury to any person or persons caused by and arising out of or resulting from negligence in the use, operation or ownership of the automobiles scheduled in said policy by any person operating said vehicle with permission of the owner. That said contract further provided that Harry E. Blodgett, Blodgett's Auto Service, Blodgett's Auto Service and Tours, the Estate of Harry E. Blodgett, deceased, or Roy R. Jordan as said executor or trustee, or any other person sustaining negligent injury, or whose property is negligently damaged became a judgment creditor, was protected by said contract. Further that said contract provided that said Royal Indemnity Company shall defend in the name and on behalf of any suit against the insured. [Par. VIII, Amended Complaint, R. 10.]

Prior to April 9, 1946, Roy R. Jordan rented in the City of Pasadena, County of Los Angeles, State of California, the aforesaid Packard automobile to Sam Richardson. That said automobile was in his possession with the consent of Roy R. Jordan on April 9, 1946. [Par. IX, Amended Complaint, R. 11.]

Sam G. Richardson on April 9, 1946, drove, operated and used said Packard automobile with the permission and consent of Blodgett or Roy R. Jordan

as said executor. [Par. X, Amended Complaint, R. 11.]

Appellee on April 9, 1946, in the County of Los Angeles, State of California, sustained bodily injuries and suffered property damages in a collision accident at which time Richardson negligently drove the aforesaid Packard automobile into and upon appellee; and appellee thereafter through his guardian *ad litem*, commenced and prosecuted an action for damages for personal injuries and property damage against the said Richardson, in the Superior Court of the State of California, in and for the County of Los Angeles, being Case No. 516890. That thereafter the court in said case signed Findings of Fact and Conclusions of Law, wherein the court found appellee had been damaged on account of said bodily personal injuries in the amount of \$25,000.00, and that appellee's estate and property was injured, wasted, destroyed, taken or carried away on account of expenses in the sum of \$4,357.00 and on account of loss of earnings in the sum of \$1,643.00. That appellee obtained judgment against said Richardson on the 12th day of September, 1946, in the sum of \$31,000.00, together with interest thereon at 7% per annum until paid, together with appellee's costs in the sum of \$14.00. That said judgment has become and is now final. [Par. XI, Amended Complaint, R. 11-12.]

Appellant had prior to June 27, 1946, notice of said collision accident and time, place and circumstances thereof, and that claims were made on behalf of, and that suit was filed by the appellee for damage sustained by reason of negligence on the part of Richardson in operating said Packard vehicle rented from and operated with the consent of Harry E. Blodgett. [Par. XIII, Amended Complaint, R. 13.]

Appellant at no time notified Sam R. Richardson that said contract of insurance insured him pursuant to the terms and conditions therein. That appellant Royal Indemnity Company or Blodgett's Auto Service for Royal Indemnity Company received a consideration for insuring said Sam G. Richardson and like persons under said contract of insurance. [Par. XIV, Amended Complaint, R. 13.]

Said judgment nor any part thereof has not been paid and remains wholly due and owing to appellee. [Par. XV, Amended Complaint, R. 13.]

Under and by virtue of the provisions of said insurance contract, Richardson was an additional insured. That as of April 9, 1946, said contract among other things insured Sam G. Richardson and provided that said insurer would pay judgments, costs taxed against the insured in a legal proceeding, together with interest accruing on judgments resulting from litigation until the payment thereof. [Par. XVI, Amended Complaint, R. 13-14.]

That all conditions and requirements of said insurance contract have been complied with, excepting the appellant making the payments due thereunder as demanded in the complaint. [Par. XVII, Amended Complaint, R. 14.]

Hereinbefore appellee has caused to be made a demand upon said insurer for the payment of said judgment, together with interest and costs, which demand has been refused and the same is now wholly due and owing to appellee. [Par. XVIII, Amended Complaint, R. 14.]

In the second cause of action of the Amended Complaint the appellee incorporated by reference all the paragraphs contained in his first cause of action, and further alleged that:

Prior to April 9, 1946, appellant had, for a valuable consideration, entered into a written insurance contract with Harry E. Blodgett, or Roy R. Jordan as aforesaid executor of the said estate or as testamentary trustee of said estate. That said insurance contract or contracts provided that said appellant would insure Harry E. Blodgett, Blodgett's Auto Service, Blodgett's Auto Service and Tours, the estate of Harry E. Blodgett, deceased, and Roy R. Jordan as said executor or trustee, and any other person against loss by reason of liability imposed by law upon each or any of them for damages because of bodily injury or destruction of property sustained by any person or persons, caused by and arising out of the use of the automobiles as scheduled in said policy. That a Packard automobile was scheduled in said insurance contract, and on April 9, 1946, was an asset of and owned by Blodgett's Auto Service. [Par. II, second cause of action, Amended Complaint, R. 14-15.]

Said contract or contracts were on April 9, 1946, in full force and effect. [Par. III, second cause of action, Amended Complaint, R. 15.]

Appellee prayed judgment in the sum of \$31,014.00, together with interest thereon at the rate of 7% per annum from the 12th day of September, 1946, until paid, and for his costs incurred therein, and such other and further relief as might seem just and equitable in the premises. [R. 15-16.]

On or about the 3rd day of February, 1950, appellant Royal Indemnity Company filed its answer to the amended complaint, in which it admitted that:

Prior to April 9, 1946, Harry E. Blodgett did business in the County of Los Angeles, State of California, in the renting for hire of passenger automobiles or drive yourself passenger vehicles.

That Harry E. Blodgett died on February 15, 1946, and subsequent thereto Roy R. Jordan was appointed executor of the estate of the said Harry E. Blodgett and testamentary trustee of the deceased's last will and testament.

The said Roy R. Jordan managed, conducted and operated the aforesaid car rental business.

Roy R. Jordan conducted the said business in the City of Pasadena and rented vehicles in the said City, to be used on the public streets of the said City of Pasadena, County of Los Angeles, State of California.

Said business was operated under the terms of that certain ordinance of the City of Pasadena known as Ordinance No. 3041 as amended.

Prior to April 9, 1946, Royal Indemnity Company entered into a written insurance contract with the estate of Harry E. Blodgett and Roy R. Jordan.

A Packard automobile was scheduled in the said insurance contract. Prior to April 9, 1946, Blodgett's Auto Service rented the said Packard motor vehicle to Richardson in the City of Pasadena, for an initial term expiring 4/14/46.

Prior to the alleged date it had notice of the purported collision accident and the claims and alleged suit of plaintiff.

In its said answer apellant denied that :

Said Doe Company and Roe Company prior to April 9, 1946, had a written contract with defendant Royal Indemnity Company or Roy R. Jordan to insure against excess liability from or to reinsure against claims or liabilities imposed by law for personal injuries or property damage resulting from accidents occurring in the operation of the business known as Blodgett's Auto Service.

Said insurance contract provides that said Royal Indemnity Company guarantees payment to a judgment creditor for that part of said judgment which is within the amounts expressed in said policy, agrees to and would be liable for damage to property or the injury to any person, agrees with the insured to pay on behalf of the insured all sums which the insured shall become obligated to pay for damages because of bodily injury or injury to or destruction of property sustained by any person caused by accident, and would insure against liability from bodily injury or destruction of property or damage to property or for injury to any person or persons caused by and arising out of or resulting from negligence in the use, operation or ownership of the automobiles scheduled in said policy by any person operating said vehicle with permission of the owner. That said contract further provides that Blodgett's Auto Service, or Roy R. Jordan as said executor, or trustee, or any other person sustaining negligent injury, or whose property is negligently damaged becomes a judgment creditor, is protected by said contract. Further said contract provides that said Royal Indemnity Company shall defend in the name and on behalf of any suit against the insured.

Richardson on April 9, 1946, drove, operated and used said Packard automobile with the permission and

consent of Blodgett's Auto Service, or Roy R. Jordan as said executor or testamentary trustee.

Appellant at no time notified Sam G. Richardson that said contract of insurance insured him pursuant to the terms and conditions therein. That appellant Blodgett's Auto Service for Royal Indemnity Company received a consideration for insuring said Richardson and like persons under said contract of insurance.

Under and by virtue of the provisions of said insurance contract, Richardson was an additional insured. That as of April 9, 1946, said contract among other things insured Richardson and provided that said insurer would pay judgments, costs taxes against the insured in a legal proceeding, together with interest accruing on judgments resulting from litigation until the payment thereof.

There is now due and owing to appellee by this appellant payment of said judgment, or any other judgment, together with interest and costs, or that there ever was or is due or owing from this appellant to appellee any sum or sums whatsoever.

In its answer appellant denied on information and belief that:

Said automobile was in the possession of Richardson on April 9, 1946.

Richardson drove the Packard automobile, or any other vehicle, into and upon appellee.

Said judgment or any part thereof has not been paid and remains wholly due and owing to appellee.

In its said answer the appellant alleged that the said Richardson did not notify appellant or the named assureds that he had ever been served with summons and

complaint in the Superior Court case number 516890; further, that the said Sam G. Richardson did not appear in court prior to the entry of his default or at the hearing of said action for the assessment of damages and that no testimony was introduced on behalf of the said Richardson and that judgment was entered in said action against him by default.

As affirmative defenses to the amended complaint appellant alleged as follows:

That it was provided in said insurance contract that as one of the conditions of this appellant assuming the risks referred to in said contract, it was the duty of the insureds to at all times render to the appellant all cooperation and assistance in the securing of information and evidence and the attendance of witnesses and in the conduct of suits; and alleged that the said Richardson failed, neglected and refused to cooperate with this appellant in the securing of the information and attendance of witnesses, failed to render to the appellant at any time, or at all, any cooperation or assistance, and in fact failed to ever contact or notify appellant regarding the purported collision or of the subsequent purported service upon him of any summons and complaint in Superior Court action number 516890, and failed to deliver same to appellant or to request appellant to defend said action; that the said Richardson failed and neglected to notify this appellant of the date of trial and failed and neglected to appear at the trial of said action as a witness and appellant was not aware that said Richardson had been served with summons and complaint in said action and was not requested to defend the said action on behalf of said Richardson referred to in appellee's complaint.

That the policy of insurance referred to in appellee's amended complaint provided that the insurance protection therein provided for was subject to certain special conditions, which said special conditions were as set out in Appellee's Exhibit "A," and among other things, provided that the insureds should at all times render to this appellant all cooperation and assistance and to aid this appellant in securing information and evidence and the attendance of witnesses in the conduct of suits arising out of the use of the automobiles referred to in said policy of insurance; that the said Richardson never at any time, prior to the entering of a default judgment against him, reported the happenings of the purported accident referred to in appellee's amended complaint to this appellant or to the named assureds; that the said Richardson failed, neglected and refused to notify this appellant or the named assureds that he was ever served with summons and complaint in said Superior Court action number 516890 and failed, neglected and refused to notify or in any way inform this appellant or the named assureds of the date of trial, and in fact, this appellant or the named assureds had no knowledge of said purported service of summons and complaint or said default or the setting of hearing to prove up damages until a time subsequent to the entry of judgment against said Richardson; that the said Richardson failed, neglected and refused to cooperate with this appellant or with the named assureds in the obtaining of any information and obtaining witnesses to said purported accident, and failed, neglected and refused to cooperate or assist this appellant or the named assureds in the conduct of suits or in obtaining the attendance of witnesses and failed and neglected to appear and testify at the trial of said action, although able so to do, all to the substantial prejudice of this appellant.

Interrogatories and Answers Thereto:

On March 10, 1950, appellee filed his Interrogatories [R. 87-96] and on March 29, 1950, appellant filed its answers thereto [R. 96-99], in which it alleged that:

The only policy of insurance between the persons alleged in Interrogatory Number 1 and this appellant, was that policy annexed as Exhibit "A" to appellee's amended complaint. [Int. No. 1, R. 87-88; Ans. No. 1, R. 96.]

Appellant was unable to answer Interrogatory No. 2 as to whether or not accident reports were on file with the police department of the City of San Gabriel, the Sheriff's Office of the County of Los Angeles, or the Pomona Division of the State Highway Patrol of California, nor did appellant have any knowledge as to the contents thereof. [Int. No. 2, R. 88; Ans. No. 2, R. 96.]

It had no information or belief as to the dates that said reports were filed or whether Sam Richardson signed any original report pertaining to the alleged injury or collision. [Int. No. 3 and No. 4, R. 88-89; Ans. No. 3 and No. 4, R. 97.]

Appellant did not know the exact contents of the said papers or report. [Int. No. 5, R. 89; Ans. No. 5, R. 97.]

It was unable to specify in what respect or to what extent the aforesaid Packard automobile was not being driven, operated or used at the time of the collision with the permission or consent of Harry E. Blodgett or Roy R. Jordan, for it had no information or belief as to whether the said automobile was being operated or used pursuant to that certain rental

agreement referred to by appellee. [Int. No. 6, R. 89; Ans. No. 6, R. 97.]

Appellant did not have sufficient information or belief on which to answer Interrogatory No. 10 in regard to whether or not the investigation reports of the Sheriff's Office and the California Highway Patrol showed the residence of Richardson, to be 836 South San Gabriel Boulevard, San Gabriel, California. [Int. No. 10, R. 90; Ans. No. 10, R. 97.]

It did not have sufficient information or belief upon which to answer Interrogatory No. 11 in respect to whether or not Roy R. Jordan recovered the said Packard automobile from the vicinity of 836 South San Gabriel Boulevard, San Gabriel, California. Int. No. 11, R. 90; Ans. No. 11, R. 97.]

It did not have sufficient information or belief upon which to answer Interrogatory No. 12 in respect to what Jordan required Richardson to do in regard to renting said Packard. [Int. No. 12, R. 90; Ans. No. 12, R. 97.]

It did not have sufficient information or belief upon which to answer Interrogatory No. 13 in respect to the records kept by Jordan in regard to the nature and contents of any documents, certificates or licenses exhibited by the said Richardson prior to renting the Packard. [Int. No. 13, R. 90-91; Ans. No. 13, R. 97.]

Prior to April 9, 1946, Jordan did write or place insurance for appellant, and maintained an insurance office in the City of Pasadena. [Int. No. 14, R. 91; Ans. No. 14, R. 97.]

On or about June 12, 1946, Jordan forwarded to this appellant a copy of the complaint served upon

him in Superior Court case Number 515192 and the only notice or knowledge received from Jordan as to the alleged collision was contained in the said complaint. [Int. No. 15, R. 91; Ans. No. 15, R. 97.]

Appellant commenced to investigate the circumstances surrounding the aforesaid collision a few days after the receipt of the complaint forwarded to it on or about June 12, 1946, by Jordan. [Int. No. 16, R. 91; Ans. No. 16, R. 97.]

Subsequent to April 9, 1946, and prior to June 27, 1946, neither Jordan nor his representatives did communicate with or report to appellant that said pedestrian was or claimed to be seriously injured physically. [Int. No. 18, R. 92; Ans. No. 18, R. 97.]

On or about December 19, 1946, an investigator of this appellant orally requested the said Richardson to inform him as to the facts surrounding the alleged collision. [Int. No. 20 and No. 21, R. 92-93; Ans. No. 20 and No. 21, R. 97-98.]

Appellant had no information or belief as to what the said Richardson could have truthfully testified to at the time of trial; however, appellant did not believe that he would have testified to any fact tending to establish his liability to appellee. [Int. No. 22, R. 93; Ans. No. 22, R. 98.]

Neither Harry E. Blodgett or Roy R. Jordan or "Blodget's Auto Service and Tours," subsequent to April 9, 1946, notified, attended, assisted or cooperated with appellant regarding defending Superior Court suits Nos. 515192 or 516890. [Int. No. 24, R. 93; Ans. No. 24, R. 98.]

Appellant was never requested to defend Richardson in any legal action, nor was it informed that he had ever been served in any action. [Int. No. 25, R. 93-94; Ans. No. 25, R. 98.]

Subsequent to April 9, 1946, it was prejudiced in that a default judgment was taken against the said Richardson without knowledge on the part of this appellant. [Int. No. 26, R. 94; Ans. No. 26, R. 98.]

Appellant had employed about seven full time investigators, adjusters or representatives in Los Angeles County regarding court actions during the period from April 9, 1946, to September 12, 1946. [Int. No. 27, R. 94; Ans. No. 27, R. 98.]

Appellant did not have sufficient information or belief upon which to answer Interrogatory No. 28 in respect to whether or not investigation notes, memoranda or reports compiled by the police department, sheriff's office or California Highway Patrol regarding the said collision were available to it from April 9, 1946. [Int. No. 28, R. 94; Ans. No. 28, R. 98.]

Appellant did not have exclusive control of defending or the opportunity to defend Superior Court Actions 515192 and 516890, entitled "George N. Olmstead vs. Sam G. Richardson, H. E. Blodgett, Roy Jordan as Executor of the Estate of Harry E. Blodgett, Deceased, *et al.*," from June, 1946, and thereafter. [Int. No. 29, R. 94; Ans. No. 29, R. 98.]

Appellant did not tender, make or attempt to make any defense of Richardson, at any time, in the two Superior Court suits. [Int. No. 30, R. 94-95; Ans. No. 30, R. 98.]

Appellant has paid \$3,500.00 on the part of Roy Jordan, executor of the estate of Harry Blodgett. [Int. No. 31, R. 95; Ans. No. 31, R. 98.]

Appellant had no information or belief upon which to answer Interrogatory No. 32 in respect to what

conditions or requirements contained in the policy annexed as Appellee's Exhibit "A" to the amended complaint, had not, as to the appellee, been complied with or performed. [Int. No. 32, R. 95; Ans. No. 32, R. 99.]

Appellant had no information or belief prior to April 9, 1946, in regard to the area outside of the City of Pasadena in which said rented automobiles were being driven. [Int. No. 33, R. 95; Ans. No. 33, R. 99.]

Appellant at no time made an attempt to intervene, appear for or make any formal motions for or on behalf of Sam Richardson in Superior Court case number 516890. [Int. No. 34, R. 95-96; Ans. No. 34, R. 99.]

Request for Admissions and Answers Thereto.

On February 15, 1950, appellee filed his request for admissions [R. 68-73] and on April 7, 1950, appellant filed its answers thereto. [R. 99-102.]

In its answers appellant admitted that:

The said Packard was in the possession of Richardson on April 9, 1946. [Req. No. 1, R. 69; Ans. No. 1, R. 99.]

Richardson drove, operated and used the said vehicle on the alleged date. [Req. No. 2, R. 69; Ans. No. 2, R. 99.]

Said vehicle was involved in an accident with the appellee on or about the time alleged. [Req. No. 5, R. 69; Ans. No. 5, R. 100.]

The said accident and the injuries purportedly resulting therefrom were the basis of appellee's cause of action. [Req. No. 6, R. 69-70; Ans. No. 6, R. 100.]

There was a collision between appellee and Richardson at or about the time and place alleged. [Req. Nos. 7 and 8, R. 70; Ans. Nos. 7 and 8, R. 100.]

The said rental memorandum shows the residence of Richardson to be 836 South San Gabriel Boulevard, San Gabriel, California, as of April 7, 1946. [Req. No. 9, R. 70; Ans. No. 9, R. 100.]

On or about the said date it agreed in open court to a stipulated judgment against the estate of Harry E. Blodgett and thereafter paid to appellee the sum of \$3,500.00 and received a full satisfaction of judgment therefor. [Req. No. 12, R. 71-72; Ans. No. 12, R. 101.]

It received full payment of the premium charged for the insurance contract attached to appellee's amended complaint as Exhibit "A." [Req. No. 13, R. 72; Ans. No. 13, R. 101.]

The said Jordan cooperated with it to the best of his ability, but in this connection appellant alleged that the first and only notice of accident received from the said Jordan consisted of a notification of the contents of the summons and complaint in the alleged action which were served upon said Jordan. [Req. No. 14, R. 72; Ans. No. 14, R. 101-102.]

The vehicle described in appellee's amended complaint was rented by the Blodgett Auto Service on

or about the date alleged, in the City of Pasadena, to Richardson for an initial term expiring April 14, 1946. [Req. No. 15, R. 72; Ans. No. 15, R. 102.]

Certain portions of the insurance contract were printed and others were typewritten. [Req. No. 16, R. 72-73; Ans. No. 16, R. 102.]

In its answers appellant denied that:

The said Richardson had the permission or consent of Jordan to drive or operate or use the said vehicle at the time and place of said accident. [Req. Nos. 3 and 4, R. 69; Ans. Nos. 3 and 4 R. 99-100.]

Richardson negligently drove the aforesaid Packard automobile into or upon plaintiff. [Req. Nos. 7 and 8, R. 70; Ans. Nos. 7 and 8, R. 100.]

Appellant ever admitted that Richardson was using the aforesaid automobile at the time and place alleged with the permission, consent or acquiescence of Harry E. Blodgett. [Req. No. 11, R. 70-71; Ans. No. 11, R. 101.]

In response to Request No. 10 appellant could not admit or deny the contents of the records of the Sheriff of Los Angeles County in regard to service of summons upon the said Richardson for the reason that it had never inspected any such records, but in this connection appellant denied that the said Sam Richardson was ever personally served with summons or complaint as alleged by plaintiff, or otherwise legally served with such summons and complaint. [Req. No. 10, R. 70; Ans. No. 10, R. 100-101.]

Motion to Strike and Motion for Summary Judgment.

On February 15, 1950, appellee filed a motion to strike portions of appellant's answer to amended complaint and for summary judgment on the pleadings. In its said motion the appellee sought to strike certain portions of appellant's answer [R. 73-77] wherein appellant alleged that:

“Sam Richardson did not notify the defendant or the named assureds that he had ever been served with summons and complaint in said action; further that defendant is informed and believes and thereupon alleged that the said Sam Richardson did not appear in court prior to the entry of his default or at the hearing of the said action for the assessment of damages and no testimony was introduced on his behalf. Judgment was entered in the said action against him by default.

It was provided that in said insurance contract that as one of the conditions of this defendant assuming the risks referred to in said contract, it was the duty of the insureds to at all times render to the defendant all cooperation and assistance in the securing of information and evidence and the attendance of witnesses and in the conduct of suits. The said Sam G. Richardson failed, neglected and refused to cooperate with defendant in the securing of information and attendance of witnesses, failed to render to the defendant at any time, or at all, any cooperation or assistance, and in fact failed to ever contact or notify defendant regarding the purported collision or of the subsequent purported service upon him of any summons and complaint in Superior Court action number 516890, and failed to deliver same to defendant or to

request defendant to defend said action. Said Sam G. Richardson failed and neglected to notify this defendant of the date of trial and failed and neglected to appear at the trial of said action as a witness and defendant was not aware that said Sam G. Richardson had been served with summons and complaint in said action and was not requested to defend the said action on behalf of said Sam Richardson referred to in plaintiff's complaint.

That the policy of insurance referred to in plaintiff's amended complaint provided that the insurance protection therein provided for was subject to certain special conditions, which said special conditions are as set out in plaintiff's Exhibit 'A' and among other things, provides that the insureds shall at all times render to this defendant all cooperation and assistance and to aid this defendant in securing information and evidence and the attendance of witnesses in the conduct of suits arising out of the use of the automobiles referred to in said policy of insurance; that the said Sam G. Richardson never at any time, prior to the entering of a default judgment against him, reported the happenings of the purported accident referred to in plaintiff's amended complaint to this defendant or to the named assureds; that the said Sam G. Richardson failed, neglected and refused to notify this defendant or the named assureds that he was ever served with summons and complaint in said Superior Court action number 516890 and failed, neglected and refused to notify or in any way inform this defendant or the named assureds of the date of trial, and in fact, this defendant or the named assureds had no knowledge of said purported service of summons and complaint or said default or the setting of hearing to prove up damages until a time subse-

quent to the entry of judgment against said Sam G. Richardson; that the said Sam G. Richardson failed, neglected and refused to cooperate with this defendant or with the named assureds in the obtaining of any information and obtaining witnesses to said purported accident, and failed, neglected and refused to cooperate or assist this defendant or the named assureds in the conduct of suits or in obtaining the attendance of witnesses and failed and neglected to appear and testify at the trial of said action, although able so to do, all to the substantial prejudice of this defendant.” [R. 74-76.]

Appellee’s motion for summary judgment was based on the contention that appellant’s answer to appellee’s amended complaint failed to state any sufficient defense to appellee’s cause of action and that appellee was entitled to judgment as a matter of law. [R. 76-77.]

In support of the motion for summary judgment appellee filed the affidavits of J. D. Brady, George N. Olmstead and Walter N. Hatch. [R. 82-87.]

In the affidavit of J. D. Brady affiant, in substance and effect, deposed that he was a lieutenant in the sheriff’s office of Los Angeles County; that the records of the said office showed that a deputy by the name of Roy Carter had served a summons and complaint in the action entitled “George N. Olmstead vs. Sam G. Richardson *et al.*, number 516890” at 804 South San Gabriel Boulevard, San Gabriel, California, at 1:00 P. M. It was further averred therein that a service ticket had a notation thereon in the handwriting of the said Roy Carter which stated:

“‘Sam G. Richardson is 5 feet 7 or 8 inches, 150-160 pounds, black wavy hair, small mustache, he

asked what it was all about and I showed him complaint and he then remarked "Oh, that was something that happened three or four months ago." ' ' "

In the affidavit of George N. Olmstead affiant, in substance and effect, deposed that he was the plaintiff in the aforesaid suit and that he had not been paid any amount by the said Sam Richardson on account of his judgment against the said Richardson and that the whole remained due and owing to him.

In the affidavit of Walter N. Hatch, affiant, in substance and effect, deposed that he was a sergeant with the Police Department of the City of San Gabriel; that on April 9, 1946, he was on duty, engaged in patrol work; that on the said date he investigated the circumstances of an accident which occurred in or about the 1200 block of South San Gabriel Boulevard; that he ascertained that the identification documents upon the injured person were in the name of George N. Olmstead and that Sam Richardson was at the location where the affiant found the injured male identified as George N. Olmstead; that upon arrival at the said location Sam Richardson stated to affiant that he was the driver of the Packard involved in the collision with George N. Olmstead and that the said vehicle was a rented vehicle; that subsequent thereto affiant had several conversations with Richardson over the period of eight or nine weeks and Richardson again stated that he had been the driver of the vehicle involved; that the said Richardson continued to reside at 836 South San Gabriel Boulevard and operated a service station at Grand and San Gabriel Boulevard for eight or nine weeks subsequent to the said accident.

Hearing on Motions.

On April 3, 1950, the appellee's motion to strike certain portions of the appellant's answer and appellee's motion for summary judgment came on for hearing and were argued before the court.

Order of Court re Motions.

On April 27, 1950, the court filed its order granting appellee's motion to strike the said portions of appellant's answer. [R. 105-108.] On the same date the court filed its findings of fact and conclusions of law [R. 108-120] and entered its judgment granting a summary judgment in favor of appellee. [R. 120-121.]

Motion for Leave to Amend Answer.

On May 5, 1950, appellant filed a motion for leave to file an amendment to its answer [R. 102-103] and for reason therefor appellant stated that on April 10, 1950, it discovered for the first time that Richardson had never been served with summons and complaint in the case of *Olmstead v. Royal Indemnity Company, et al.*, Los Angeles Superior Court action number 516890. It was further stated that the amendment was necessary and material to the defense of the above entitled action.

The amendment to answer [R. 104-105] alleged by way of a further, separate and distinct affirmative defense to both causes of action of appellee, that the judgment sued

upon was void for the reason that the said Superior Court of the State of California in and for the County of Los Angeles had never acquired jurisdiction over the said Richardson in that the said Richardson was never properly served with a copy of the summons and complaint.

Motion for New Trial and to Set Aside Judgment.

On May 4, 1950, appellant filed a motion for a new trial and to set aside judgment [R. 122-130] on the ground that:

It was error for the court to grant appellee's motion for summary judgment in that the record and all the pleadings and papers on file showed that there were genuine issues as to several material facts and that the appellee was not entitled to judgment as a matter of law.

It was also stated in the said motion that it was error for the court to make certain findings of fact more particularly enumerated on pages 123 to 128 of the Record.

It was further contended by appellant that it was error for the court to award judgment to appellee in the sum of \$20,014.00 for the reasons that:

(a) The contract of insurance limited the liability of the appellant to \$15,000.00 for personal injuries.

(b) The Ordinance relied upon by appellee did not require insurance for property damage.

(c) Appellee's complaint in the Los Angeles Superior Court case, which is the basis of the above entitled action, was a complaint for damages to person and not to property.

(d) That the contract of insurance in question did not include special damages arising out of personal injuries as damages to property.

(e) Special damages arising out of personal injuries are not damages to property.

(f) There is a complete and full satisfaction on record in the Los Angeles Superior Court case number 516890, which was the basis of appellee's action against appellant.

In support of these motions appellant filed the affidavits of: Sam G. Richardson [R. 130-132]; George E. Hosey [R. 132-133]; Elizabeth E. Richardson [R. 133-134]; Robert E. Dunne [R. 134-135]; Hulen C. Callaway [R. 135-139] and R. W. Clayton [R. 140-142].

In the affidavit of Sam G. Richardson [R. 130-132] affiant deposed and said: That on or about the 21st or 22nd day of July, 1946, he had departed from the State of California and went to Fort Worth, Texas, where he remained for four or five weeks; that at no time during August of 1946 was he in the State of California and that at no time was affiant served with a summons and complaint or any papers in an action instituted by George N. Olmstead; that during the last ten or fifteen years he had never grown or worn a mustache; that in 1946 he was 5' 9" in height, weighed 175 pounds and had straight hair, the color of which was light brown sprinkled with grey, with grey hair at the temples.

In the affidavit of George E. Hosey [R. 132-133] affiant deposed and said that he was personally acquainted with Sam G. Richardson and his mother, Mrs. Elizabeth

E. Richardson of Ft. Worth, Texas; that he saw the said Sam G. Richardson daily from the latter part of July, 1946, to the latter part of August, 1946; that he knew of his own knowledge that Sam G. Richardson was in Ft. Worth, Texas, on August 3, 1946.

In the affidavit of Hulen C. Callaway [R. 135-149] affiant deposed and said that he was and had been one of the attorneys of record in the above case since it was filed and actively in charge of the defense of said case; said affidavit went on to state in detail all of the various efforts that he had made and which he caused to be made to garner the facts preparatory to filing the necessary pleadings in the defense of the above entitled case.

Affiant further stated that the fact that no legal service had been made on Richardson had not been discovered until April 10, 1950, which was subsequent to the hearing on appellee's motion for summary judgment on April 3, 1950.

In the affidavit of Robert E. Dunne [R. 134-135] affiant deposed and said that he was an attorney at law licensed to practice in the State of California; that he was one of the attorneys for appellant in the above-entitled case; that on the 10th day of April, 1950, he interviewed Richardson at Folsom Prison; that the said Richardson had been incarcerated in the said prison since January, 1948, and he had light brown hair streaked with gray and is gray at the temples.

In the affidavit of R. W. Clayton [R. 140-142] affiant deposed and stated in detail all of the steps and efforts taken by him to investigate the facts and circumstances concerning the whereabouts of Richardson.

Attached to the appellant's motion for new trial as Exhibit "X" was a copy of the complaint in the case of

George N. Olmstead v. Sam Richardson, et al., numbered 516890 entitled "complaint for damages to person." [R. 142-148.]

Statement in Opposition to Motion.

On May 10, 1950, appellee filed his statement of reasons in opposition to motion and in support thereof filed a counter-affidavit of C. Paul DuBois [R. 149-156]; a copy of summons [R. 157-159]; and an affidavit of R. W. Carter, deputy sheriff. In the latter affidavit affiant deposed and said that he had served a person whom someone had pointed out to him as Sam Richardson and that the said Sam Richardson was 5 feet, 7 or 8 inches in height, 150-160 pounds, had black wavy hair with a small mustache; and a copy of an order of suspension of the driver's license of Sam Richardson signed by Edgar E. Lampton.

Order of Court re Motion to Amend Answer and Motion to Set Aside Judgment.

On May 22, 1950, the court filed its memorandum decision and its minute order. In its said order it denied the motion for new trial and appellant's motion to file an amendment to answer, and granted the motion to set aside the judgment and ordered a new judgment in the sum of \$16,500.00 plus \$14.00 costs. [R. 166-171.]

On June 26, 1950, the court filed its modified findings of fact and conclusions of law. [R. 173-176.]

Judgment of the Trial Court.

On June 26, 1950, the court entered a new judgment in the sum of \$16,514.00 with interest thereon from September 12, 1946, in favor of George N. Olmstead. The total amount of said judgment, including interest, was \$20,879.45. [R. 177-178.]

SPECIFICATION OF ERRORS.

IT WAS ERROR FOR THE TRIAL COURT TO STRIKE A PORTION OF APPELLANT'S ANSWER.

IT WAS ERROR FOR THE TRIAL COURT TO GRANT A JUDGMENT BASED ON AN INVALID JUDGMENT OBTAINED IN THE STATE COURT.

IT WAS ERROR FOR THE TRIAL COURT TO DENY APPELLANT'S MOTION TO AMEND ANSWER.

IT WAS ERROR FOR THE TRIAL COURT TO GRANT A SUMMARY JUDGMENT IN FAVOR OF APPELLEE FOR THE FOLLOWING REASONS:

1. *The record and all the pleadings and papers on file herein show that there are genuine issues as to several material facts.*

2. *The following findings of fact made by the trial court were erroneous:*

(a) "That it is true that said ordinance was by its terms declaratory of public policy that pedestrians or any other person who may be injured as a result of a you-drive business venture putting a dangerous instrumentality such as an automobile into the possession of an irresponsible driver, be protected against otherwise uncompensated damage resulting from negligent operation or use thereof by any person responsible for such operation." [Finding No. IV, R. 110.]

(b) "That it is true that said agreement, Exhibit A, was a required and compulsory undertaking pursuant to said ordinance of the City of Pasadena." [Finding VII, R. 111.]

(c) "That it is true that on April 9, 1946, said Packard automobile while being driven by the said Sam Richardson, with the permission and consent of the named insureds, was involved in a collision accident with plaintiff herein in the 1200 block, South San Gabriel Boulevard." [Finding XIII, R. 113.]

(d) "That it is true that plaintiff in said collision accident at said time and place sustained bodily injuries and property damage." [Finding XVI, R. 133.]

(e) "That it is true that the said Sam Richardson, receiving possession of said Packard automobile on April 7, 1946, under a rental agreement with the named insureds was the driver of said vehicle on April 9, 1946, at the time of the aforesaid collision accident with plaintiff, and was also the Sam Richardson who was named a defendant in a civil suit in Superior Court of the State of California in and for the County of Los Angeles, wherein plaintiff herein took judgment against Sam Richardson on account of bodily personal injuries in the sum of \$25,000.00 and on account of property damage in the sum of \$6,000.00 on the 12th day of September, 1946." [Finding XVII, R. 113-114.]

(f) "That it is true that defendant, Royal Indemnity Company, a New York corporation, had on or about June 12, 1946, actual notice of said collision accident and of the time, place and circumstances thereto, and that plaintiff herein then claimed personal injuries and property damage, and that plaintiff herein had filed a civil suit in negligence for damages against the said Sam Richardson and the named insureds as the result of

(g) “That it is true that plaintiff’s judgment and all thereof against Sam Richardson, also known as Sam G. Richardson, was and is unpaid, and that interest at 7% on said judgment from September 12, 1946, and all thereof, was and is unpaid, together with plaintiff’s allowed costs of suit in said Superior Court action in the sum of \$14.00.” [Finding XX, R. 114-115.]

(h) “That it is true that subsequent to April 9, 1946, defendant, Royal Indemnity Company, a New York corporation, was not prejudiced in any wise in their defense of liability under Exhibit A except that a judgment for personal injuries and property damage was taken by plaintiff against this defendant’s additional insured, Sam G. Richardson.” [Finding XXIV, R. 116.]

(i) “That it is true that defendant, Royal Indemnity Company, a New York corporation, having actual knowledge of the pendency of this plaintiff’s claims, had the opportunity to defend its additional insured, Sam G. Richardson, in said damage suits.” [Finding XXV, R. 116.]

(j) “That it is true that defendant, Royal Indemnity Company, a New York corporation, in its defense of Harry E. Blodgett in connection with this plaintiff’s Superior Court action for civil damages, in a verified answer for said named insured of June 27, 1946, admitted that the Packard vehicle was being used and operated by Sam G. Richardson at the time and place of the aforesaid collision accident with the permission, consent and acquiescence of the named insured.” [Finding XXVIII, R. 117.]

(k) “That it is true that plaintiff’s judgment against Sam G. Richardson in the prior civil action for damages in the Superior Court has not been satisfied in whole or in part.” [Finding XXIX, R. 117.]

(1) “That it is common knowledge that automobiles rented in 1946 in the City of Pasadena are not necessarily intended to be entirely confined, as to their operations, to the municipal limits or physical boundaries of the City of Pasadena.” [Finding XXXII, R. 118.]

(To avoid unnecessary repetition the detailed particulars showing wherein the above findings are error are set forth in *Argument* hereinbelow, rather than at this point.)

3. *Appellee was not entitled to summary judgment as a matter of law for the following reasons:*

a) The policy was a voluntary policy and appellant was entitled to assert its defenses thereunder against appellee.

b) The State Court judgment upon which appellee’s action was based had already been satisfied.

4. *No judgment against appellant could have legally exceeded \$15,000.00.*

a) The contract of insurance limits the liability of appellant to \$15,000.00 for personal injuries.

b) Appellee’s complaint in Los Angeles Superior Court action 516890, which is the basis of the above entitled action, is “a complaint for damages to person” and makes no allegations or prayer concerning damages to property.

c) Coverage B on page 2 of Exhibit “A” attached to plaintiff’s complaint [R. 21] shows that property damage as used by the parties referred to “damages because of injury to or destruction of property. . . .”

d) Special damages arising out of personal injuries are not damages to property.

e) The ordinance relied upon by plaintiff does not require insurance for property damage.

SUMMARY OF ARGUMENT.

The contract of insurance herein specifically set forth the terms and provisions which governed the parties. By striking the above outlined portions of the appellant's answer the court negatived certain of these terms and thereby deprived the appellant of valuable rights under the said contract. In making its decision the court reasoned that the said policy of insurance was compulsory. However, the accident occurred outside of the city limits of the City of Pasadena and therefore beyond the governmental jurisdiction of that municipality. The policy was, therefore, a voluntary policy as to this particular accident. Furthermore, reference to the ordinance involved herein reveals that there is no provision whatsoever in respect to damages to property; hence, it could not be said that the policy was compulsory as to such coverage.

The State court action which is the basis of appellee's suit herein was void in that the said State court never acquired jurisdiction over Mr. Richardson since he was not served with summons or complaint. In any event, an inspection of the record herein reveals that even if the said State court judgment was valid it had already been satisfied and the appellee had therefore received full satisfaction for any damage which he might have suffered. The said State court judgment was satisfied by the payment of \$3,500.00 by appellant for and on behalf of Roy Jordan, executor of the estate of Harry E. Blodgett.

The trial court made thirty-three findings of fact. Not all of these findings were based upon admissions. Many of them were in dispute. Since, therefore, there were many material triable issues of fact presented the trial court should not have granted a summary judgment.

ARGUMENT.

It Was Error for the Court to Strike a Portion of Appellant's Answer.

As already indicated above, in the statement of the case, the court ordered those portions of the appellant's answer which set up the defenses of lack of cooperation, notice, etc., of the additional assured Sam Richardson, stricken. By so doing the court deprived the appellant of virtually the only protection which it had under the policy and literally made the appellant subject to liability in complete disregard of the law as well as the terms of the contract of insurance.

It is clearly well settled law in California and in most other states of this country that there are two types of insurance contracts—voluntary and compulsory. When an insured and an insurance company enter into a policy voluntarily they are of course governed by the terms of their contract and if the said policy provides that the assured is to give notice of any accident, forward suit papers and cooperate with the company, it is imperative that he so do before the insurance company becomes liable under the said contract.

Hynding v. Home Accident Insurance Co., 214 Cal. 743, 7 P. 2d 1013;

Phillips v. Stone, 297 Mass. 341, 8 N. E. 2d 890;

Sheldon v. Bennett, 282 Mass. 240, 184 N. E. 722.

It is also true that in such cases where the policy of insurance is voluntary the injured person has no greater rights against the insurance company than the assured as far as imposing liability on the insurance company for

injuries. If the insured is in violation of the terms of the contract and cannot hold the company to its contract, the injured person is in the same position in that his rights rise no higher than those of the insured and he cannot hold the insurance company liable under the terms of the contract of insurance.

If the insurance policy is compulsory, that is, if the policy is required by a statute to cover vehicles while they are being used in a certain place and in a certain manner, the injured person has rights which are greater than the rights of the assured in the event there is a violation of the policy terms by the assured.

Hynding v. Home Accident Insurance Co., supra;

Phillips v. Stone, supra;

Sheldon v. Bennett, supra.

Briefly, the insurance company is prevented from taking advantage of the terms of the compulsory insurance policy even though the assured has violated same.

In the instant case Ordinance No. 3041 of the City of Pasadena [R. p. 327] provides that:

“Any person, firm, association or corporation may apply to the City of Pasadena for a permit to rent, lease or to allow or permit the operation or use of any drive-yourself vehicle *upon the streets of the City of Pasadena*, by filing with the City Manager of the City of Pasadena, upon forms to be supplied by said City without charge to the applicant, an application which shall state: . . . (Section 4(c).) (Italics added.)

“That the owner has secured and paid in advance the annual premium upon an insurance policy whereby the insurer agrees to be liable for the death of or injury to any person resulting from negligence in the operation of any such drive-yourself vehicle by any person using and operating the same with the permission, express or implied, of such owner.” (Section 4(c)(5).)

The minimum liability upon each for-hire automobile being not less than \$15,000.00 for *personal injuries* to one person and \$30,000.00 for personal injuries resulting to two or more persons in any one accident. (Section 4(c)(5).)

A drive-yourself vehicle is defined in the said Ordinance as:

“A motor propelled passenger vehicle or truck . . . *which is operated or used in the City of Pasadena*, and which the owner for consideration rents or leases to or allows or permits the operation or use by, a person, firm, corporation, or association who or which directs and controls the operation or use of and furnishes the driver for said vehicle or truck, or who or which pays a separate consideration for the services of said driver.” [R. p. 326.] (Section 1(h).) (Italics added.)

From the provisions of this Ordinance above referred to it can be perceived that the City of Pasadena sought to require insurance policies for certain drive-yourself vehicles *to be used on its city streets*. Therefore it would seem that as to the said vehicles being driven on the City streets the policy would be compulsory. Since the Ordinance does not purport to require insurance for vehicles driven outside the City of Pasadena, it must like-

wise be said that as to the vehicles so driven beyond the limits of Pasadena, the insurance is not required or compulsory. The accident which purportedly forms the basis of appellee's suit occurred beyond the City limits of Pasadena, to-wit: at or about the 1200 block of South San Gabriel Boulevard, County of Los Angeles. [See affidavit of Walter N. Hatch in support of plaintiff's motion for summary judgment, R. 84-87.] Therefore, any insurance on the vehicle in question was not compulsory when it was not being driven on the City streets of Pasadena.

This contention is fully supported by the decisions in those states which require compulsory insurance to be issued on all vehicles driven on the highways or streets of the state. For example: The State of Massachusetts has long had a compulsory insurance statute in force and the decisions of that state hold that when an accident involving a Massachusetts car covered by compulsory insurance occurs outside the State of Massachusetts, or upon private property, the insurance is voluntary and the injured person stands in no better position than the assured and therefore the insurer has available as against the injured person all defenses which he has as against the assured. The following decisions are representative of the many cases which hold this principle:

In *Phillips v. Stone*, 297 Mass. 341, 8 N. E. 2d 890, the court briefly summarized the facts in its holding as follows:

“On September 4, 1931, the plaintiff was hurt by an automobile operated by the son of the defendant Stone. The accident occurred in a driveway on pri-

vate land, and not on 'the ways of the commonwealth.' Any resulting liability was not within the compulsory motor vehicle liability insurance act (G. L. (Ter. Ed.), c. 175, §113A *et seq.*), but if covered by liability insurance was subject to the principle that the injured person acquired no right against the insurer superior to that of the insured owner. If by violation of the terms of the policy the latter has lost his right to indemnity, there is nothing for the injured person to reach. (Cases cited.)

"After obtaining judgment by default against the defendant Stone, the plaintiff brought this bill in equity under G. L. (Ter. Ed.), c. 175, §§112, 113, and chapter 214, §3(10), to reach and apply to the satisfaction of the judgment the obligation of the defendant insurance company upon its policy of liability insurance. The judge found that the failure of the defendant Stone to give the defendant insurance company written notice of the accident until twenty days after the accident and eighteen days after he knew of it, was a breach of the condition of the policy that he give such notice 'as soon as practical after hearing' of an accident. This finding was warranted if not required. (Cases cited.)"

And in the case of *Sheldon v. Bennett*, 282 Mass. 240, 184 N. E. 722, the court was confronted with a similar situation, except that the accident occurred in the State of New Hampshire. In rendering its decision the court said:

"The plaintiffs contend that the company should be held to have intended to give the assured the same coverage in New Hampshire which he had in Massachusetts; that if the accident had happened in Massachusetts the company was obliged to pay any person

when injured up to the limits of the policy, regardless of any default on the part of the assured . . . the fact that the policy which Samuel T. Bennett had was compulsory in Massachusetts did not by the extra-territorial indorsement continue the policy as a required or compulsory policy in the State of New Hampshire.”

See also:

Masterson v. Am. Employers Ins. Co., 288 Mass. 518, 193 N. E. 59;

Sleeper v. Mass. Bonding & Ins. Co., 283 Mass. 511, 186 N. E. 778.

It is interesting to note that the Massachusetts courts are uniform in their support of the principle enunciated above by the cited cases even though the following unequivocal provision is found in the compulsory insurance statutes of that state:

“That no violation of the terms of the policy and no act or default of the insured, either prior or subsequent to the issue of the policy, shall operate to defeat or avoid the policy so as to bar recovery within the limit provided in the policy by a judgment creditor proceeding under the provisions of said section one hundred and thirteen and clause (10) of section three of chapter two hundred and fourteen.”

Annotated Laws of Massachusetts, Chapter 175, Sec. 113A, subsec. (5).

It is clear from the reading of the above authorities that the same policy can be both compulsory and voluntary at one and the same time. In other words, the policy is compulsory when the vehicle is being driven within that area intended to be covered by the statute or ordinance

and the same policy is voluntary when the said vehicle is beyond the said area.

In the case at bar the Appellee contends that the policy was a required policy and that therefore the insurance company was not entitled to assert against him any of the defenses which it so properly had against the assured. Presuming, without admitting, that the said policy was required, appellee fails to consider that since the accident in question occurred beyond the territorial jurisdiction of the City of Pasadena the said policy would not be compulsory as to coverage at that time and place.

By granting appellee's motion to strike the aforesaid portions of appellant's answer the court concurred in the erroneous contention of the appellee and thereby subjected the appellant to risks and hazards not anticipated at the time it entered into its contract.

It Was Error for the Court to Grant a Summary Judgment in Favor of Appellee for the Following Reasons:

- 1. The Record and All the Papers and Pleadings on File Herein Show That There Are Genuine Issues as to Several Material Facts.**

The court made 33 findings of fact [R. 108-118], and surely it must be admitted that the court would not have made findings as to such purported facts unless it thought that they were genuine or material. And it cannot be said that all of the findings are based on admissions of the appellant for the reason, as will be shown hereinbelow, that many of the admissions requested by appellee were specifically and unequivocally denied. Furthermore, as can be shown, many of the findings of fact are without basis in

that there is absolutely no evidence whatsoever to support said findings.

In order to render its judgment the court had to determine that the prior judgment entered in the State court action No. 516890 was a valid and subsisting judgment. However, before it could make such a decision the court had to determine that Sam G. Richardson was served in the said action. Whether there was service upon the said Richardson was, therefore, a material question of fact and it was error for the court to decide the said question on a motion for a summary judgment. It is, of course, fundamental that the question presented by a motion for summary judgment is whether or not there is a genuine issue of fact and not how that issue should be determined.

Rule 56(c), Fed. Rules of Civ. Proc.;

Ramsouer v. Midland Valley R. Co., 135 F. 2d 101, 103;

Merchants Ind. v. Peterson, 113 F. 2d 4.

2. The Following Findings of Fact Made by the Court Were Erroneous.

(a) "That it is true that said ordinance was by its terms declaratory of public policy that pedestrians or any other person who may be injured as a result of a you-drive business venture putting a dangerous instrumentality such as an automobile into the possession of an irresponsible driver, be protected against otherwise uncompensated damage resulting from negligent operation or use thereof by any person responsible for such operation." [Finding No. IV, R. 110.]

This finding was error for the reason that the ordinance speaks for itself and it makes no reference to irresponsible drivers and furthermore there was no evidence whatsoever that the City of Pasadena enacted this ordinance for this reason, or for any reason other than that specified in the ordinance to wit: To regulate the operation of drive-yourself vehicles *upon the public streets of Pasadena*.

(b) "That it is true that said agreement, Exhibit A, was a required and compulsory undertaking pursuant to said ordinance of the City of Pasadena."
[Finding VII, R. 111.]

This finding was error for the reason that there was no evidence introduced to show that the City of Pasadena intended to extend the effect of its ordinance beyond its city limits, or that it intended to protect citizens of other communities or that it had the right to project the effect of its ordinance beyond its limits into the jurisdiction of another governmental unit. Furthermore there was no evidence as to whether or not the contracting parties intended that this particular policy be compulsory or whether or not there had been other or previous policies issued to comply with the aforesaid Ordinance. Since there was no evidence offered either way, it could well be that some other policy issued by some other company was procured by Blodgett's Auto Service in satisfaction of the said Ordinance and that the policy in question was, or could have been, an additional policy.

As already indicated above, the title of the Ordinance shows that it is "An Ordinance of the City of Pasadena regulating the operation of certain motor propelled vehicles, drive-yourself vehicles, vehicles transporting passengers

for compensation or for sight-seeing purposes *upon the public streets.*" (Italics ours.) And the Ordinance defines a drive-yourself vehicle as one "which is operated or used in the City of Pasadena." See also, Section 4(c) of the said Ordinance which provides:

"Any person, firm, association or corporation may apply to the City of Pasadena for a permit to rent, lease or to allow or permit the operation or use of any drive-yourself vehicle *upon the streets of the City of Pasadena.*" (Italics ours.)

In the face of these clear and positive provisions in the Ordinance showing that the City of Pasadena intended to regulate traffic upon its own streets, it cannot be determined how the court could have found that the afore-said policy could have been compulsory beyond the City limits of Pasadena.

It is strange indeed that the court granted a summary judgment on the basis that the question as to whether or not the policy was compulsory or voluntary was a question of law and yet it made the above finding of fact that the said policy was compulsory.

(c) "That it is true that on April 9, 1946, said Packard automobile while being driven by the said Sam Richardson, with the permission and consent of the named insureds, was involved in a collision accident with plaintiff herein in the 1200 block, South San Gabriel Boulevard." [Finding XIII, R. 113.]

This finding was error for the reason that there was no evidence of permission and/or consent given by the named insureds to the said Richardson to drive or use the vehicle as it was being used on the evening in question. In fact,

the answer and all other papers on file in this action show that appellant specifically denied that there was permission and/or consent.

The ordinance specifically provides that the rented vehicle must be used with the permission of the rentor. Here the appellee alleges such permission and the appellant positively denies permission or consent. Clearly, this issue is a disputed issue of fact. Merely because the vehicle was rented to Richardson does not mean that it was being operated with the permission or consent of the rentor at the time of the accident.

This principle is well expressed by the case of *Employers Casualty Company v. Williamson*, 179 F. 2d 11 at p. 13:

“We, accordingly, conclude that the court’s finding and conclusion that Yarsant obtained the possession of the truck with the consent of the partnership is supported by the record. But this does not dispose of the case. *The precise question is was Yarsant at the time of the accident using the truck for the purpose for which permission was granted.*” (Italics ours.)

(d) “That it is true that plaintiff in said collision accident at said time and place sustained bodily injuries and property damage.” [Finding XVI, R. 133.]

This finding was error for the reason that there was no evidence showing property damage and in fact the complaint filed by appellee in the Los Angeles Superior Court case number 516890, which is the basis of the above-entitled action, was for damages to person and was so captioned.

(e) "That it is true that the said Sam Richardson, receiving possession of said Packard automobile on April 7, 1946, under a rental agreement with the named insureds was the driver of said vehicle on April 9, 1946, at the time of the aforesaid collision accident with plaintiff, and was also the Sam Richardson who was named a defendant in a civil suit in Superior Court of the State of California in and for the County of Los Angeles, wherein plaintiff herein took judgment against Sam Richardson on account of bodily personal injuries in the sum of \$25,000.00 and on account of property damage in the sum of \$6,000.00 on the 12th day of September, 1946." [Finding XVII, R. 113-114.]

This finding was error for the reason already shown above, that there was absolutely no evidence introduced to show that appellee was awarded any amount for damages to property and in fact, he had never alleged nor prayed for damages to property in his action in the State Court.

(f) "That it is true that defendant, Royal Indemnity Company, a New York corporation, had on or about June 12, 1946, actual notice of said collision accident and of the time, place and circumstances thereof, and that plaintiff herein then claimed personal injuries and property damage, and that plaintiff herein had filed a civil suit in negligence for damages against the said Sam Richardson and the named insureds as the result of negligence on the part of Sam Richardson in his operation of said Packard vehicle during the rental period for which the named insureds had consented to his use and given possession of said Packard vehicle." [Finding XVIII, R. 114.]

This finding was error for the reason that there was no evidence introduced showing, or tending to show, that

this defendant had any notice other than that received from Roy Jordan which was based on the complaint served on him in the Los Angeles Superior Court case number 516890, attached hereto as Exhibit "X." Reference to Request No. 14 of the Request for Admissions [R. 72] and the Answers thereto [R. 101-102] show that the first and only notice of accident which appellant received was that notification found in the summons and complaint which was forwarded to appellant by the said Roy Jordan. It cannot be said that the allegations of the said complaint constituted notice as to actual facts of either the accident or circumstances surrounding same, for the reason that said complaint merely contained the allegations of appellee as to his interpretation of the said circumstances and did not in any way specifically outline any probative or evidentiary facts necessary to aid or assist the appellant in investigating the said accident or in enabling it to marshal evidence or find witnesses to the said accident. Again it must be asserted that the complaint filed by the appellee in the State Court was a complaint for personal injuries and was not a complaint for property damage.

(g) "That it is true that plaintiff's judgment and all thereof against Sam Richardson, also known as Sam G. Richardson, was and is unpaid, and that interest at 7% on said judgment from September 12, 1946, and all thereof, was and is unpaid, together with plaintiff's allowed costs of suit in said Superior Court action in the sum of \$14.00." [Finding XX, R. 114, 115.]

"That it is true that plaintiff's judgment against Sam G. Richardson in the prior civil action for damages in the Superior Court has not been satisfied in whole or in part." [Finding XXIX, R. 117.]

These findings were error for the reason that appellant proved that appellee was paid \$3,500.00 in complete satis-

faction of record in the aforesaid State Court action No. 516890 (See Request No. 12 of Appellee's Request for Admissions and Answer No. 12 of Appellant's Answers to Request for Admissions).

(h) "That it is true that subsequent to April 9, 1946, defendant, Royal Indemnity Company, a New York corporation, was not prejudiced in any wise in their defense of liability under Exhibit A except that a judgment for personal injuries and property damage was taken by plaintiff against this defendant's additional insured, Sam G. Richardson." [Finding XXIV, R. 116.]

This finding was error for the reason that there was no evidence introduced to show that appellee was awarded any amount for damages to property.

(i) "That it is true that defendant, Royal Indemnity Company, a New York corporation, having actual knowledge of the pendency of this plaintiff's claims, had the opportunity to defend its additional insured, Sam G. Richardson, in said damage suits." [Finding XXV, R. 116.]

This finding was error for the reason that there was no evidence introduced to this effect and the argument made by appellee is not evidence. Furthermore, it would have been contrary to all legal and ethical practices for this appellant, by and through its attorneys, to enter a general appearance for Richardson who had not requested defense or representation, since it would have exposed him to liability without his consent. In fact, as shown by the affidavit of Sam Richardson [R. pp. 130-132] he had never

been served with the summons and complaint in the said action and it would have been highly irregular for the appellant to cause an appearance to be made for the said Richardson when the court never had jurisdiction over him.

(j) "That it is true that defendant, Royal Indemnity Company, a New York corporation, in its defense of Harry E. Blodgett in connection with this plaintiff's Superior Court action for civil damages, in a verified answer for said named insured of June 27, 1946, admitted that the Packard vehicle was being used and operated by Sam G. Richardson at the time and place of the aforesaid collision accident with the permission, consent and acquiescence of the named insured." [Finding XXVIII, R. 117.]

This finding was error for the reason that there was no evidence introduced to this effect and this appellant has positively and unqualifiedly denied that there was such permission and/or consent. [Answer to Request for Admissions No. 11, R. 101.]

(k) "That it is common knowledge that automobiles rented in 1946 in the City of Pasadena are not necessarily intended to be entirely confined, as to their operations, to the municipal limits or physical boundaries of the City of Pasadena." [Finding XXXII, R. 118.]

This finding was error for the reason that there was no evidence introduced to this effect and this observation was not within the issues since the question was: Did the parties to the insurance contract intend that the coverage beyond the jurisdiction of the City of Pasadena and its ordinance be compulsory or voluntary? Reference is

hereby made to the portions of the Ordinance hereinabove quoted which show that the purpose of the City of Pasadena enacting the Ordinance was *to regulate traffic on its own City streets* and whether or not vehicles do or do not leave the City limits of Pasadena has no relevance or importance in this case.

3. Appellee Was Not Entitled to Summary Judgment as a Matter of Law for the Following Reasons:

(a) The policy is a voluntary policy and appellant was entitled to assert its defenses thereunder against appellee. (For the argument in support of this contention see the matter contained under the heading: "It Was Error for the Court to Strike a Portion of Appellant's Answer"; at page 35 of this Brief.)

(b) The State Court judgment upon which appellee's action was based had already been satisfied.

Appellee contends that a judgment was rendered against Richardson and that the same remains unsatisfied. Appellant on the other hand maintains that there had been a satisfaction of judgment for the following reasons:

(a) The judgment entered in favor of appellee in that certain action was a default judgment against the said Richardson. [R. p. 64.]

(b) The said judgment was entered in the same case in which Roy Jordan, Executor of the Estate of Harry E. Blodgett, deceased, was sued and the said default judgment was entered before a judgment was rendered in favor of appellee and against the said Roy Jordan, in the sum of \$3,500.00.

(c) A satisfaction of judgment against the said Roy Jordan was entered as "full satisfaction of record in said action."

These three factors are significant for the following reasons: Where two defendants having a joint liability are sued and a default judgment is rendered against one of these persons, the court may go on to judgment as against the other defendant, however a satisfaction of the judgment against either of these defendants bars the plaintiff from receiving further satisfaction from the other defendant for the reason that the plaintiff can have but one satisfaction for the injury that he has received.

Tompkins v. Clay Street R.R. Co., 66 Cal. 163, 4 Pac. 1147;

Dawson v. Schloss, 93 Cal. 194, 29 P. 31;

Grundel v. Union Iron Works, 173 Cal. 438, 441, 160 P. 565.

In *Tompkins v. Clay Street R.R. Co.*, *supra*, a car of the Clay Street Hill Company collided with a car of the Sutter Street Railroad Company. Plaintiff, a passenger in the car of the latter company, was thrown from her seat and injured. Plaintiff recovered damages from the Clay Street R.R. Company and the appeal was by that company.

The court was confronted with the question concerning the right of plaintiff to recover against one of two tortfeasors when the other had already made payment to plaintiff. In its decision the court said:

"Every party contributing to the injuries of plaintiff was liable to the full extent of the damages by her sustained. Her injuries gave her but a single

cause of action. If she had brought a separate action against the Sutter Street Company, *and recovered a judgment therein, and such judgment had been satisfied*, she could not subsequently have maintained another action for the same injuries against the Clay Street Company, inasmuch as the conclusive presumption would be that she had already received full compensation for all damages by her sustained." (Italics added.) (P. 166.)

Furthermore, it is clearly well settled law in this State that when one of the joint defendants defaults and the action continues to judgment as against the remaining defendant, the amount which the plaintiff finally obtains in the action (wherein there was no default) is the only amount to which the plaintiff is entitled.

Cole v. Roebling Const. Co., 156 Cal. 443, 105 P. 255.

In that case the action was one for the recovery of \$6,618.00 for personal injuries alleged to have been suffered by reason of the negligence of the defendants. Summons was duly served on both defendants and one of the defendants, Wilson, failed to appear within the time allowed by law and his default was entered on March 1, 1907. On March 29, 1907, the court proceeded to the hearing of the cause as to Wilson and found the damage was \$6,318.00 and ordered a judgment against Wilson accordingly. The findings and decision were filed on March 29, 1907, and the judgment was entered on March 30, 1907.

The said defendant Wilson appealed and contended in part that the trial court had no right to award separate

judgment against him, and secondly, he contended that when the action went to trial as against the one defendant the judgment therein might be for an amount smaller than the judgment entered against him.

The court summarily dismissed the first contention by stating that the injured party could have brought separate actions against Wilson and the other defendant, and although containing the precise allegations to each party would have stated a complete and separate individual liability against the party sued. The court further stated that the awarding of a judgment in one of the causes of action did not preclude the plaintiff from proceeding to judgment against the other, *but that the plaintiff would be barred from recovering on one judgment if he had satisfaction for the other judgment.*

In respect to defendant Wilson's contention that the action against his co-defendant might well proceed to judgment in an amount lower than that against him, the court said:

“There will be no severance of damages even if plaintiff is allowed to proceed and obtain judgment against the remaining defendant for a different amount. *The amount for which he finally obtains judgment* against the other defendant would be the total amount of damage that in the opinion of the trial court or jury the plaintiff had suffered from the wrongful act of both defendants.” (Italics ours.) (P. 450.)

In the case at hand the appellee caused a default judgment to be entered as against Sam G. Richardson on September 13, 1946, and on April 22, 1947, appellee received

a judgment as against Roy Jordan in the amount of \$3500.00, which judgment was satisfied on April 23, 1947; the appellee has, therefore, received full and due compensation from one of the joint defendants sued in the case of *Olmstead v. Sam G. Richardson*, Los Angeles Superior Court No. 516890, referred to in appellee's pleadings and supporting papers, and is not entitled to further compensation.

See also:

Butler v. Ashworth, 110 Cal. 614, 43 P. 386.

4. No Judgment Against Appellant Could Have Legally Exceeded \$15,000.00 for Personal Injuries, in That:

(a) The contract of insurance limits the liability of appellant to \$15,000.00 for personal injuries.

(b) Appellee's complaint in Los Angeles Superior Court action No. 516890, which is the basis of the above entitled action, is a complaint for damages to person and makes no allegations or prayer concerning damages to property.

By virtue of Coverage A of the policy [R. 20] the appellant agreed to pay on behalf of the insured all sums which the insured would become obligated to pay by reason of the liability imposed upon him by law for damages, *including damages for care and loss of services* because of bodily injury, sickness, or disease sustained by any person caused by accident. The limits of liability as to Coverage A was \$15,000.00 for each person so injured. [R. 19.]

Since appellee did not sue for damages to property in his action in the State Court he clearly was not entitled to demand payment from the appellant for any damage to property in the action herein.

(c) Coverage B on page 2 of Exhibit "A" attached to plaintiff's complaint [R. 21] shows that property damage as used by the parties, referred to "damage because of injury to or destruction of property . . ."

(d) Special damages arising out of personal injuries are not damages to property.

(e) The ordinance relied upon by plaintiff does not require insurance for property damage.

At the very outset it must be noted that the term "property" can be shown to have almost any desired meaning when considered abstractly. This is true for the very reason that everything in this world, apart from human beings, is property and in some parts of the world even human beings are property. In short, everything in this world can be owned by someone. For example:

As early as 1858 the Supreme Court of the State of California defined property as follows:

"Property is the exclusive right of possessing, enjoying, and disposing of a thing; it is 'the right and interest which a man has in lands and chattels, to the exclusion of others'; and the term is sufficiently comprehensive to include every species of estate, real or personal. (McKeon v. Bisbee, 9 Cal. 137, 142, 70 Am. Dec. 642.)"

Since that time the courts of this state, and other states, have run the gamut and now we find that “Even a free game which a person might win on a pin ball machine has been judicially invested with the dignity of ‘property.’” (*Downing v. Municipal Court*, 88 Cal. App. 2d 345 at 350, 198 P. 2d 923.) And a product of the mind is property. (*Johnston v. 20th Century-Fox Film Corp.*, 82 Cal. App. 2d 796 at 808, 187 P. 2d 474.)

Briefly, everything in which a person may have rights to the exclusion of any other person is property. (Civ. Code, Sec. 654.) However, the term property is very rarely used in this broad sense for the reason that the ordinary affairs of the every day world demand that the term be confined to that type or class of property which may be contemplated at the given time. The court in the case of *Bogan v. Wiley*, 90 Cal. App. 2d 288 at 293, 202 P. 2d 824, expressed this thought as follows:

“The word ‘property’ in its most general sense is broad enough to cover everything, tangible and intangible, which may be the subject of ownership (authority cited) but ‘The meaning of the term may be restricted by the context of a particular statute or writing in which it is used’ (authority cited) . . .

“But the meaning to be given to the word depends upon the sense in which it is used, as gathered from the context and the nature of the things which it was intended to refer to and include.” (Italics ours.)

To the same effect is *Los Angeles Pacific Co. v. Hubbard*, 17 Cal. App. 646 at 649, 121 P. 306.

For example: If A sells B his piece of property in Los Angeles he is clearly referring to a piece of real estate

and B knows this. If a restaurant posts a sign to the effect that it will not be responsible for "property left, lost or stolen on its premises" everyone reading this sign will understand what is intended by the restaurant. If A says to B: I have some property in a certain race horse, B understands that A means that he has an interest in the horse or is part owner of the horse.

In each of the examples immediately set forth above, the term "property" is used, yet in each instance the persons involved did not use property in its broad sense nor did they use qualifying adjectives to limit the meaning of the word property as used. Rather, each transaction spoke for itself, that is to say, the context of the exchanged language together with the surrounding circumstances indicated the exact meaning of the term in each instance.

In view of the foregoing therefore, it follows that in order to ascertain the meaning of the word "property" as used in the insuring agreement by the parties hereto, it is necessary to examine the transaction between the parties and the context of the instrument entered into by them at the conclusion of this transaction.

Referring to the context of the policy we find that Coverage B of the said policy [R. 21] is as follows:

"To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law for damages because of injury to or destruction of property, including the loss of use thereof, caused by accident and arising out of the ownership, maintenance or use of any automobile."

An analysis of the various uses of the term “property” in the policy, whether taken singularly or together, indicate that it was not intended by either of the parties to be used in its broad sense. On the contrary, it can be shown that the parties intended the term “property” to include only tangible or corporeal property. For example, appellee contends that he has suffered property damage in that he has had to pay medical expenses and has suffered loss of earnings because of his injury. That is to say, that he has suffered the loss of his own services. However, such damages are included in Coverage A, which refers to the liability of appellant for bodily injury. Reference to Coverage A [R. 20-21] shows that the coverage under this clause includes “*damages for care and loss of services, because of bodily injury, . . . sustained by any person or persons and caused by accident.*” (Italics ours.)

If the parties to the said insurance contract had intended that medical expenses and damages for loss of services be considered to be property, it would not have been necessary to include the above italicized clause in Coverage A. Rather such coverage would be automatically included in Coverage B.

That reference to the context of the insurance policy and the circumstances of the transaction between the parties is the proper method to arrive at a correct construction of the terms used in the policy is further supported by the following sections of the Civil Code of California, relating to the interpretation of contracts:

“*Sec. 1641.* The whole of a contract is to be taken together, so as to give effect to every part, if rea-

sonably practicable, each clause helping to interpret the other.”

“*Sec. 1643.* A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties.”

“*Sec. 1644.* The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meanings; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed.”

“*Sec. 1645.* Technical words are to be interpreted as usually understood by persons in the profession or business to which they relate, unless clearly used in a different sense.”

“*Sec. 1648.* However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract.”

A detailed study of each of the above sections, together with an application thereof to the policy at hand, indicates rather sharply that the parties did not use the term property in its so-called “broad sense.”

Furthermore, an examination of the Ordinance in question reveals that it was intended to require insurance for personal injuries only and not for damage to property. Therefore, all of the insuring clauses in the aforesaid policy referring to property damage must be deemed to be voluntary insurance and not compulsory for there is nothing in the Ordinance to make them so.

In view of this it must be said that in any event the defenses available to the insurance company under the terms of its policy may be asserted against appellee at least as to any claims made for property damage.

It Was Error for the Court to Deny Appellant's Motion to Amend Answer.

As already indicated above in the Statement of the Case, appellant discovered very important evidence after the hearing on appellee's motion for summary judgment. This evidence was to the effect that Sam G. Richardson had never been served in Superior Court action No. 516890, which has already been shown as the basis of appellant's law suit. Upon discovery of this evidence the appellant, through its attorneys, made a motion to amend its answer for the purpose of alleging this most important defense in its pleadings. [R. p. 104.] It is the belief of appellant that since this evidence was not discovered until after the hearing it was entitled to amend its pleadings for the protection of its interests.

Rule 15 of the Federal Rules of Civil Procedure clearly provides that a party may amend his pleadings even after judgment.

In the case of *Downey v. Palmer*, 27 Fed. Supp. 993, a motion made by the defendant to dismiss the complaint was granted in the alternative and the plaintiff served a reply pursuant thereto. The defendant then sought to amend her answer by setting up a defense of statute of limitations. The plaintiff had objected to such amendment on the ground that it did not go to the merits and that

it had been waived. The court granted the motion and stated:

“Under our new Rules amendment of pleadings is to be freely allowed when justice so requires.”

Surely, it cannot be denied that the above mentioned evidence showing that there had never been any service upon Richardson was improper for the reason that such a judgment entered in a case where there had never been service of process upon a defendant cannot be deemed to be a valid or subsisting judgment. Therefore, this evidence was of the utmost importance and the court should have granted appellant's motion to amend its answer to plead the invalidity of the aforesaid judgment based upon such lack of service.

See also, *DiTrapani v. M. A. Henry Co.*, 7 F. R. D. 123.

It Was Error for the Court to Grant a Judgment Based on an Invalid Judgment Obtained in the State Court.

The affidavit of Sam G. Richardson [R. 130-132] reveals that the said Richardson was in Fort Worth, Texas, on the date when the Sheriff's Deputy, R. W. Carter had supposedly served him in Los Angeles, California. In fact, said affidavit also showed that Sam G. Richardson had been in Fort Worth continuously from sometime before and after the said date of purported service upon him. In support of the said Richardson's contention are the affidavits of George E. Hosey, a Notary Public in and for the County of Tarrant, State of Texas, and the affidavit of Elizabeth Richardson, the mother of Sam G. Rich-

ardson. Clearly, if Mr. Richardson was in Fort Worth as these affidavits indicate, he could not have been in San Gabriel at the time Mr. Carter claims.

Furthermore, a review of Mr. Carter's affidavit [R. 160-161] shows that he personally did not know Sam Richardson and in fact purportedly served him after receiving information from a Mr. Holloway, who allegedly pointed Richardson out to the said Carter from "among a scattered group of three or four men in the Station." When we weigh the affidavits in support of Mr. Richardson's claim that he was in Fort Worth at the time of the claimed service upon him with the affidavit of Mr. Carter, we see that the latter affidavit fails to have the strength to absolutely and unequivocally establish service upon Richardson. Mr. Carter's affidavit of service becomes even weaker when it is considered that in one place the affiant claims to have served Mr. Richardson in a service station [R. p. 160] and in another place he claims to have served Mr. Richardson at 804 South San Gabriel Boulevard [R. p. 83]. 804 South San Gabriel Boulevard is a nursery. Add to this the fact that in considering a motion for a summary judgment the court should take that view of the evidence most favorable to the party against whom the motion is directed, giving to that party the benefit of all favorable inferences that may reasonably be drawn from the evidence and we find that the value of Mr. Carter's affidavits have little, if any, value.

See, *Ramsouer v. Midland Valley R. Co.*, 135 F. 2d 101, 106.

Reference is also made to those portions of Mr. Richardson's affidavit wherein he says that in the year 1946

he was 5' 9" in height, weighed 175 pounds and had straight hair, the color of which was light brown sprinkled with grey, with grey hair at the temples, and that he had not worn a mustache during the last ten or fifteen years. This information is indeed in sharp contrast to that found in the aforesaid affidavit of Mr. Carter wherein he says "Sam Richardson, 5 ft. 7 or 8 inches, 150-160 lbs., *black wavy hair, small mustache.*" (Italics ours.)

It is apparent from an examination of these opposing affidavits that Mr. Carter was mistaken in claiming that he had served Mr. Richardson since he was not in San Gabriel to be served.

It is fundamental that where there has been no service of process or if there has been invalid service of process the court never acquires jurisdiction and the judgment based on such service is VOID.

People v. One 1941 Chrysler Sedan, 81 Cal. App. 2d 131, 183 P. 2d 707.

Since said judgment was void and not merely voidable, the trial court herein should not have given any effect to it.

Bower v. Casanave, 44 Fed. Supp. 501;

Wyman v. Newhouse, 93 Fed. 2d 313, 315.

In fact, it is well settled that the jurisdiction of any court exercising authority over a subject may be inquired into in every other court when the proceedings in the former are relied upon and brought before the latter by a party claiming the benefit of such proceedings.

Gonzales v. Tuttmann, 59 Fed. Supp. 858, 862;

Adam v. Saenger, 303 U. S. 59, 58 S. Ct. 454, 82 L. Ed. 649.

It is significant that, in *Gonzales v. Tuttmann*, *supra*, the court denied a summary judgment and said:

“In the absence of essential facts concerning jurisdiction over the persons against whom the said judgments purport to run, the motion for summary judgment as to the second cause of action must accordingly be denied.”

One of the primary essentials of the system of justice so long promulgated in our courts is the absolute requirement that every person have the right to protect himself when he is assailed in a court of law. It is manifest from the above that both Mr. Richardson and the appellant have been deprived of this right. The trial court herein erred when it failed to examine into the jurisdiction upon which the judgment was rendered in State court action No. 516890 and hold that by virtue of the lack of service upon Richardson the said judgment was void and could not have been a basis for any judgment in the Federal court. In any event whether Richardson was, or was not served in the State Court action was a disputed question of fact and should not have been decided by the trial court on the motion for a summary judgment.

Conclusion.

For the reasons hereinabove stated it is respectfully submitted that the trial court erred in the various particulars herein outlined and for the said reasons the judgment should be reversed.

TRIPP & CALLAWAY,

By HULEN C. CALLAWAY,

Attorneys for Appellant.

No. 12691.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ROYAL INDEMNITY COMPANY, a corporation,

Appellant,

vs.

GEORGE N. OLMSTEAD,

Appellee.

APPELLEE'S BRIEF.

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FILED

MAR 22 1951

PAUL P. O'BRIEN,

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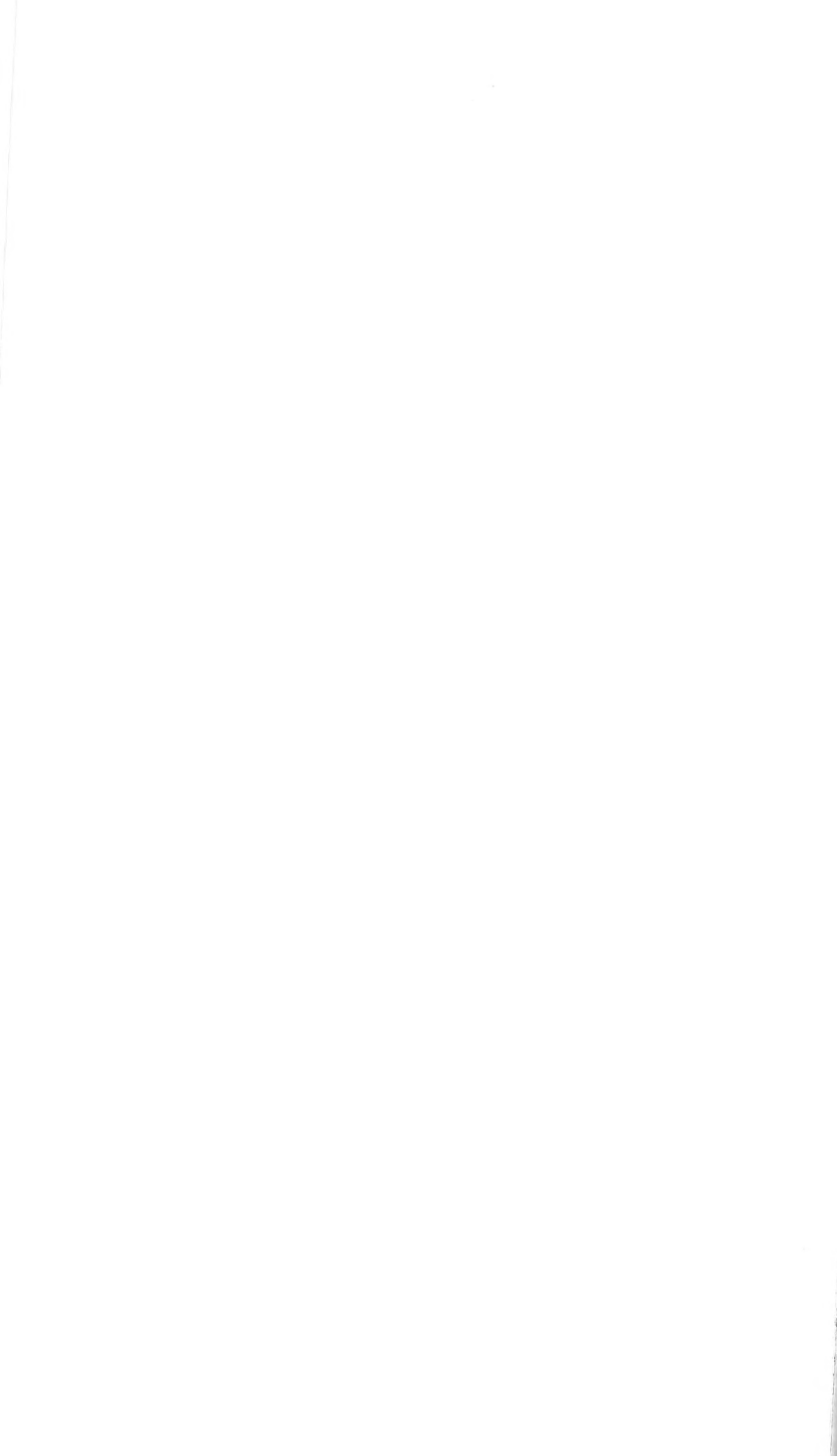
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No. 12691.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ROYAL INDEMNITY COMPANY, a corporation,

Appellant,

vs.

GEORGE N. OLMSTEAD,

Appellee.

APPELLEE'S BRIEF.

Statement of Pleadings and Facts.

In the first cause of action of the amended complaint, appellee alleged:

1. A written insurance contract of appellant was issued pursuant to a municipal ordinance [Amended Complaint, Par. VII; R. 8-9].
2. On or about April 7, 1946, Roy R. Jordan rented to Sam G. Richardson, in the City of Pasadena, for a consideration, a certain Packard automobile for purposes of using said vehicle as a passenger carrying automobile, for an initial term of one week expiring April 14, 1946, and such car was in said Richardson's possession with the consent of Roy R. Jordan for said purpose on April 9, 1946 [Amended Complaint, Par. IX; R. 11].

3. The person, Sam G. Richardson, who rented the said Packard, and who drove, operated and used it on April 9, 1946, was the same and identical person that negligently drove the said car, on April 9, 1946, into and upon appellee and causing damages therefor, and against whom judgment was subsequently taken for \$31,000 in the Superior Court of the State of California, in and for the County of Los Angeles [Amended Complaint, Par. XII; R. 12].

4. In appellant's answer it *admitted* that:

(a) Roy R. Jordan conducted the car rental business in the City of Pasadena, County of Los Angeles, State of California [Amended Complaint, Par. VI; R. 8; see Answer to Amended Complaint, R. 63].

(b) On February 16, 1946, appellant, for a valuable consideration, entered into and issued the said written insurance contract entitled a "Comprehensive Liability Policy," with and to the Estate of Harry E. Blodgett, deceased, and Roy R. Jordan [Amended Complaint, Par. VIII; R. 9; see Answer to Amended Complaint, R. 63].

(c) The said insurance contract was "*required*" by a certain ordinance of the City of Pasadena; that said contract was applied for, because of and issued pursuant to, under and in accordance with such ordinance; that said ordinance was, at all times herein, part of the terms, covenants and agreements of appellant in such contract; that said contract was filed with the City of Pasadena; that

thereafter, said City issued its municipal license permit, under said ordinance, to said Estate and the said Jordan for the operating of such business [Amended Complaint, Par. VII; R. 8; see Answer to Amended Complaint, R. 63].

(d) The allegations of appellee, as shown at 2 hereinabove [Amended Complaint, Par. IX; R. 11; see Answer to Amended Complaint, Par. III; R. 63].

(e) Appellee, on April 9, 1946, in the County of Los Angeles, State of California, sustained bodily injuries and suffered property damages in a collision accident; thereafter, appellee brought an action for damages for personal injuries and property damage against the said Sam Richardson and others in the Los Angeles Superior Court, being case No. 516890; thereafter the court, in said case, signed Findings of Fact and Conclusions of Law establishing that appellee had been damaged (i) on account of said bodily personal injuries in the amount of \$25,000.00, and further (ii) that appellee's estate and property was "injured, wasted, destroyed, taken or carried away" in the additional sums of \$4,357.00 and \$1,643.00; appellee obtained judgment against Sam G. Richardson on the 12th day of September, 1946, in the sum of \$31,000.00 together with interest thereon at 7% per annum until paid, together with \$14.00 costs; that said judgment has become and is now final [Amended Complaint, Par. XI; R. 11; see Answer to Amended Complaint, Par. V; R. 63].

(f) The said contract was, on April 9, 1946, in full force and effect [Amended Complaint, Par. III; R. 15; see Answer to Amended Complaint, R. 65].

Appellee's Request for Admissions and Answer Thereto.

In its answers, appellant further admitted that:

(a) In Los Angeles Superior Court action No. 515192, appellant in a verified answer alleged in substance and effect that Sam G. Richardson was using and operating the said car at such time and place of the accident with the permission, consent and acquiescence of the Estate of Harry E. Blodgett, deceased, and the said Jordan [Req. No. 11, R. 70; Ans. No. 11, R. 101].

Appellee's Motion to Strike and Motion for Summary Judgment.

(a) The affidavit of J. D. Brady, in support of the motion, alleged that the official records of the sheriff's office of Los Angeles County established that Deputy Sheriff Roy Carter had served the said Superior Court summons and complaint on Sam G. Richardson on August 3, 1946 [R. 82].

The trial court made a separate and individual order striking certain of appellant's allegations which made up some alleged affirmative defenses. This order was dated April 27, 1950, and was separately entered and docketed [see R. 105-108].

No appeal has been taken from the entry of said order. The appeal was taken only from the judgment of June 26, 1950 [R. 177-178], which only is for a money amount as a result of a proceedings under Rule 56, and wherein no mention, express or implied, nor reference is made to the order striking the affirmative defenses.

Appellant's Motion for New Trial and to Set Aside Judgment.

Appellant's motion did *not* state as a basis that there is a complete or full satisfaction of judgment against Richardson in the Los Angeles Superior Court suit, case No. 516890, which is the basis here of appellee's action against appellant; rather, that a satisfaction of judgment was entered and applicable *only* to appellee's judgment against Jordan, by reason of appellant's payment to appellee of the sum of \$3,500.00 as the amount of said judgment [R. 129].

The affidavit of Sam G. Richardson in support of such motions alleges: that he was involved in a collision accident on April 9, 1946, when the automobile, which he was driving, collided with a pedestrian in the vicinity of the 1200 block of San Gabriel Boulevard in the County of Los Angeles; that at said time, and for several months subsequent thereto, he operated a garage and service station at 836 South San Gabriel Boulevard, San Gabriel, California.

The counter-affidavit of C. Paul Du Bois in opposition to said motions in substance alleges: On June 7, 1946, appellee filed suit in the Los Angeles Superior Court, being case No. 515192, for damages arising out of the accident with Sam Richardson; an answer by Roy Jordan was filed in said action with verification dated June 27, 1946; said action was dismissed on July 16, 1946; that on July 18, 1946, a new suit in Los Angeles Superior Court, case No. 516890, was filed by appellee and arising out of the same casualty; Roy Jordan filed an answer thereto and verified

July 29, 1946. The law firm of Tripp, Callaway, Sampson and Dryden filed both answers; that affiant, on information and belief, alleges said attorneys were acting for appellant in affording defense to said actions. On *September 12, 1946*, in case No. 516890, the Superior Court entered judgment against Sam G. Richardson. An abstract of said judgment was recorded on *September 18, 1946*, with the Recorder of Los Angeles County. On *February 7, 1947*, the California State Department of Motor Vehicles issued and sent registered mail to Sam G. Richardson its order suspending the driver's license of the said Sam G. Richardson. Examination of the records of the Sheriff of Los Angeles County shows that (i) on February 19, 1947, a writ of execution against Richardson issued in case No. 516890, and (ii) by said Sheriff, immediately was levied on all real and personal property of Sam Richardson at 836 South San Gabriel Boulevard, and (iii) a sheriff's keeper was put in possession and charge and there continued until October, 1947, at which time personal property was transferred to storage. On March 22, 1947, appellant's counsel, Hulen C. Callaway, as representing Jordan, took a deposition of appellee. Appellee's counsel and Hulen C. Callaway, as attorney for Jordan, signed on April 22, 1947, a written stipulation and approval of form of judgment, and further both counsel stipulated in open court that appellee take judgment against Roy Jordan, as legal representative, and as executor of said estate. It is therein provided "Upon the receipt of said sum [\$3,500.00] to plaintiff, his guardian *ad litem* and plaintiff's attorney are authorized to execute a satisfaction of *said* judgment

and the clerk is authorized to enter *this* judgment accordingly and to enter a satisfaction thereof when so executed." A satisfaction of judgment was filed which provides "The judgment having been paid, full satisfaction is hereby acknowledged . . . in favor of plaintiff and *against Roy Jordan*. . . ." On April 21, 1947, appellee's counsel wrote Hulen C. Callaway as attorney for Royal Indemnity and Jordan wherein it is said, in part: "It is my understanding with you that defendant Roy Jordan waives all right of subrogation against defendant Sam G. Richardson, and further *a satisfaction of judgment against Roy Jordan will not satisfy the judgment against Sam G. Richardson.*" (Emphasis ours.) Thereafter Hulen C. Callaway wrote, under date of April 25, 1947, to appellee's counsel, wherein it is said in part: ". . . this is to advise that although the draft of the Royal Indemnity Company payable to George N. Olmstead . . . stated on its face, 'Dismissal with prejudice Superior Court action 516890,' *this was actually in satisfaction of judgment* of the above-numbered case *insofar as the defendant Roy Jordan*, executor for the estate of Harry E. Blodgett, deceased, as Testamentary Trustee under the Last Will and Testament of Harry E. Blodgett, deceased, *and not otherwise*. I am authorized on behalf of my principal, the Royal Indemnity Company, to *waive any right of subrogation against the co-defendant*" (emphasis ours). Municipal Court records of Los Angeles in case No. 795847, wherein the same Sam G. Richardson is a defendant, reveals a deputy sheriff served him with process in the County of Los Angeles on *January 31, 1947* [R. 149-156]. The said affidavit annexes as exhibits the abstract of judgment, as recorded, the order of suspension by the Department of Motor Vehicles, the proof of service of process upon the said Richardson in said suit by appellee in the Superior Court, etc.

Appellant's Omissions in Statements of Pleadings.

Appellant's statement of the pleadings (App. Op. Br. p. 3) is approximately correct as far as it treats the matter. Many matters are omitted which appellee deems important. The most significant are:

I. *The amended complaint—the exhibit which is the exact substance of the appellant's contract* with its named assured, the City of Pasadena, a municipal corporation, and the public, is in its original form partly typewritten and partly printed. [See Finding VIII, R. 111.] For purposes of aiding in understanding a principal basis of appellee's action, attention is respectfully directed to:

(A) The following *typewritten* portions of the contract:

(1) occupation of the named assured is that of public livery, U-Drive vehicles [R. 117] in the City of Pasadena, but residing in the City of South Pasadena [R. 51];

(2) agrees to pay, within limits of liability, with respect to bodily injury, in the amount of \$15,000.00 for one person or \$30,000.00 for more than one person, and with an additional \$5,000.00 for property damage liability [R. 19], and that appellant received \$2,503.96 as preliminary premium;

(3) that such contract coverage is "for personal, pleasure, family and business use" [R. 32];

(4) that supplementing certain provisions hereinafter to be mentioned, the appellant was to and did receive compensation for this contract on a "Gross earnings basis" of the U-Drive rental business [R. 34] wherein no mention is provided for *any* geographic area of or limitation to operating said cars rented as U-Drive within any particular locale nor is there any express or implied limitation of

any kind for the purposes of calculating appellant's compensation for said contract;

(5) the Packard vehicle, involved in this suit, is specifically designated [R. 35];

(6) the nub of the entire contract is [R. 39] provided to be, by the appellant in its own drafted language,

“ . . . it is agreed, that notwithstanding expressions inconsistent with or contrary thereto, this policy is specifically issued to cover passenger carrying automobiles rented or leased . . . or permits to be used as drive-ur-self vehicles . . . ; ‘Assured’ . . . shall include the driver of any vehicle insured hereunder, when driving . . . with consent; AND IN THE EVENT THAT A FINAL JUDGMENT FOR ANY LOSS OR CLAIM . . . IS RENDERED AGAINST . . . THE DRIVER OF SUCH AUTOMOBILE, [Appellant], THE INSURER GUARANTEES PAYMENT DIRECT TO THE PLAINTIFF, SECURING SUCH JUDGMENT OF THAT PART OF SAID JUDGMENT WHICH IS WITHIN THE LIMITS EXPRESSED IN THE POLICY . . . and for the purpose of enforcing *this guarantee*, an action may be commenced and maintained against the insurer by any such plaintiff.” (Emphasis ours.)

Other reference is made to notice to the City Manager of the City of Pasadena in the event of election of certain termination options.

(7) Additional reference should be made, in the same typewritten paragraph, to the language “. . . this policy is specifically issued to cover . . . automobiles *rented or leased in the City of Pasadena.*” (Emphasis ours.)

(8) Other schedules for appellant's premiums are set out [R. 41, 42].

Attention is next respectfully directed to:

(B) The following printed portions (but appellee does not, by making this reference, contend or admit that any language, so treated or included, varies or changes the effect of the language of guaranty as set out at paragraph (6) or (7) herein-next-above):

(1) the nature of the contract is "Comprehensive Liability policy" [R. 16, 43];

(2) agrees to pay, on behalf of the person renting the car and driving with consent of the owner, ". . . all sums . . . imposed upon him by law, for damages . . . because of bodily injury . . . sustained by any person . . . and caused by accident . . ." [R. 20, 21];

(3) agrees to pay, on behalf of the person renting the car and driving with consent of the owner, ". . . all sums . . . imposed upon him by law for damages because of injury to or destruction of property, including the loss of use thereof, caused by accident . . . and arising out of the maintenance or use of any automobile" [R. 21];

(4) further, appellant agreed to ". . . defend in his name and behalf any suit . . . alleging injury, . . . or destruction and seeking damages on account thereof, even . . . if groundless, false or fraudulent" [R. 22], and continuing ". . . all costs taxed . . . in any such suit, . . . all interest accruing after entry of judgment until the company has paid . . ." [R. 22];

(5) and further “. . . guaranteeing the insured’s appearance in court . . .” [R. 22];

(6) and further “. . . reimburse . . . for all reasonable expenses . . . incurred at the company’s request” [R. 22, 23];

(7) and to pay these additional items in addition to the limits of the contract [R. 23].

(8) As a definition, the person renting is deemed and treated the same as the owner within the contract terminology, namely: “. . . ‘insured’ includes the named insured and also . . . any person while using an owned automobile or hired automobile and any person legally responsible for the use . . . provided the actual use is with the permission of the named insured . . .” [R. 23].

(9) As to geographic area, designated “territory” by the contract, the protection afforded is “. . . within the United States . . ., its territories or possessions, Canada or Newfoundland . . . or between ports thereof . . .” [R. 24, 25].

(10) Appellant’s compensation, for the contract or protection, is to be measured by:

- (i) initial or preliminary payment is only estimated amount subject to subsequent determination [R. 27], at “1, Premium” and also “(2)”;
- (ii) definition of “cost” [R. 28] at “(3)” and “(4)”;
- (iii) records shall be kept [R. 28];

- (iv) audit of records is provided [R. 29] at “2”; [R. 38] at “5”;
- (v) premium based on “. . . *total gross earnings* . . . *of all automobiles* . . .” [R. 36] at “3” and [R. 37] at “C” (emphasis ours); and additional provisions for minimum premiums, in same numbered section;
- (vi) type of information to be recorded for premium purposes is: place of principal garaging, description of particular car including seating capacity, date of acquisition or transfer of particular automobile [R. 37];
- (vii) number of automobiles operated [R. 38].

(11) Appellant prescribes (aside from effect of type-written endorsement, hereinabove at I(A)(6)) with respect to “property damage,” the provisions contained in paragraphs concerning and headed or entitled “Notice of Claim or Suit,” “Assistance and Cooperation of the Insured,” “Action Against Company,” “Other Insurance” and “Subrogation” apply *only* to “BODILY INJURY” coverage and *expressly do not apply* to “PROPERTY DAMAGE” coverage [R. 47].

(12) Appellant has, apparently, attempted to define “Property Damage,” at “3” of [R. 49], to be “. . . the limit of the company’s liability for all expenses incurred by or on behalf of each person who sustains bodily injury . . . in any one accident . . .”

(13) Appellant's language also prescribes the contract or protection

“ . . . shall comply with the provisions of the motor vehicle financial responsibility laws of *any state or province* which shall be applicable . . . arising out of the ownership maintenance or use . . . of any automobile . . . *to the extent of the coverage* and limits of liability required . . . *but in no event in excess of the limits of liability stated in this policy* . . . ” [R. 56, 57]. (Emphasis ours.)

(14) Notice of an accident may be given on behalf of the driver, and to any authorized agent; and such notice shall include identification of the driver (or driver and owner), time, place and circumstances of the accident, name and whereabouts of injured person, and available witnesses [R. 57].

(15) Notice of claim or suit is to be given to appellant [R. 57].

(16) Assistance and cooperation, is likewise provided “ . . . *upon the company's request* . . . ” to be given [R. 57], to attend hearings, assist in settlement, securing and giving evidence, attendance of witnesses and conduct of suits.

(17) Appellant's contract or protection runs to “ . . . *any person* or organization . . . who has secured such judgment . . . shall thereafter be entitled to recover under this policy . . . ” [R. 58];

(18) nor does “Bankruptcy or insolvency . . . relieve the company of its obligations hereunder” [R. 58].

Appellee's Statement of Case.

Pursuant to the Rules of the United States Court of Appeals, for the Ninth Circuit, Rule 20(c), appellee submits his statement of the case.

As appellee sees the issues, herein:

- A. The trial court's judgment was and is proper because no legal error was made nor judicial discretion abused, nor has appellant shown either or both. There remained no substantial, material, genuine issue of fact to warrant the denial of Summary Judgment, or to justify, after entry and docketing of judgment, leave to amend appellant's answer.
- B. The amount of the judgment was and is proper.

The issue concerning affirmative defenses contended for by appellant is not in fact here an issue, for want of taking an appeal from the Order striking that portion of appellant's answer designated affirmative defenses.

Summary of Argument.

The appellee's cause of action is based upon his state court judgment against appellant's assured for money damages for "personal injuries" and "property damage" and upon the contract of insurance involved herein which guaranteed payment of such judgment and provided that an action is maintainable directly against said insurer, under the provisions of said contract and under the laws of the State of California and the City of Pasadena.

The guarantee provisions of the contract, and it being compulsory protection as being required by an ordinance

of the City of Pasadena in order that the particular business concern might obtain a license to do or engage in such business, makes the contract a “compulsory” or “required” type of policy of insurance for the protection of the public, and to which there are no defenses to insurer’s liability on the contract as a result of any subsequent act or omission on the part of the insured, such as failure to cooperate, give notice of suit, etc., to the insurer. These defenses were stricken from appellant’s answer to the amended complaint, as a matter of law, leaving no genuine issues of fact to be resolved. It is immaterial that appellee was injured just outside the boundaries of the City of Pasadena as neither the ordinance nor the contract in anywise limits the place of injury to be within the city boundaries. Such protection is for the benefit of such members of the public as might be damaged by such a dangerous instrumentality being placed in the hands of an irresponsible driver, by a business concern subject to municipal licensing requirements, as a condition precedent to engaging in such business in such municipality.

Appellant’s inclusion of “property damage” coverage, as an addition to bodily injury, in such contract, filed with the City of Pasadena pursuant to its ordinance, was intended by the insurer to be that the entire protection be subject to the requirements of the ordinance and the public had a right to rely thereon. Appellant had a free choice, in preparation of such contract, to limit its liability in certain particulars, but appellant did not do so. The state court judgment is in part for “property damage” and

the pleadings so admit. Such judgment hence is binding in the present action, and the property damage, so found under state law, is property herein and is covered by the appellant's policy.

Appellant here attempts, improperly, a collateral attack upon the state court judgment. It cannot be thus challenged because the judgment is valid on its face. Even if this court now could, *collaterally*, review such judgment, as for jurisdiction (and appellee submits it cannot), the record and judgment roll herein shows due and regular service of process, by a deputy sheriff, upon Sam G. Richardson.

The \$3,500.00 paid by the appellant for the sole account of Roy Jordan was in satisfaction of the stipulated judgment against *him* only, *and not* for the account of the co-defendant Richardson as a separate judgment debtor. This was the explicit intention and expression of the parties, reduced to written terms, at the time the judgment was stipulated, entered and later satisfied. Further, such \$3,500.00 payment would not discharge the judgment debtor *primarily* liable for a greater sum of \$31,014.00, than a joint and several judgment debtor could be liable for under the \$5,000.00 limitation by law of financial responsibility of driver and owner of a vehicle.

The findings of fact are all supported by the record. While some may not have been necessary to the decision, as for example, surplusage, there were no material, substantial genuine issues of fact in this case remaining as triable issues of fact.

ARGUMENT.

I.

It Was Not Error for the Court to Strike a Portion of Appellant's Answer.

The basis for the order striking the affirmative defenses of appellant (as to lack of cooperation, notice, etc.) is that appellant's contract, as filed by appellant with the City of Pasadena pursuant to the City ordinance, created a *compulsory* or *required* substance and type of insurance contract. Such contract is for the primary benefit of the public and results in a third party beneficiary contract. There are, as a matter of law, no such defenses available to the insurer, where the action is by the injured person on such contract against such insurer, for and as a result of injury suffered caused by the negligence of the insured and a judgment for damages has been rendered against such insured person.

Kruger v. California Highway Indemnity Exchange, 201 Cal. 672, 258 Pac. 602, 275 U. S. 568 (cert. denied).

Appellant concedes in its brief the above point of law; it seemingly also agrees that its policy was "compulsory" except in this circumstance argues it was "voluntary" because the appellee was injured just outside the limits of the City of Pasadena.

Ordinance No. 3041 of the City of Pasadena further provides that:

"That the owner has secured . . . an insurance policy whereby the insurer agrees to be liable for . . . injury to *any person* . . . resulting from negligence in the operation of any such drive-ur-self vehicle *by any person* . . . that said policy shall

be deemed to comply . . . on any and all driveyourself vehicles *rented* . . . *or* used in the City of Pasadena. . . .” (Section 4(c)(5).) [R. 328.]

“It shall be unlawful for any person . . . *to rent* . . . *or permit* the . . . *use* of any . . . vehicle *in the City of Pasadena* unless . . . the owner . . . is the holder of a valid . . . permit by the City of Pasadena as provided in this ordinance.” (Section 2(a).) [R. 326.] (Emphasis ours.)

The ordinance additionally is regulatory in purpose over those engaging in the business of letting out of automobiles to the general public. The framers of the ordinance knew, and it is common knowledge, that such automobiles would cross the city boundaries. Such legislators wisely provided, as a condition precedent to the obtaining of a license permit to engage in the business to so rent, the requirement of depositing an insurance policy to protect *any person* who may be injured and wherever he may be situated. There is no limitation, in the ordinance, to the city streets of Pasadena. It will be noted the ordinance uses the disjunctive “*or*” throughout. The ordinance also pertains to persons, not solely as renters, but principally as *drivers*. The municipal regulation is over the conducting business of rentals in the instant case. It is not the question of extra-territoriality contended by appellant; as is expressed in:

Croft, Admx., Respondent v. Hall, et al., Appellants
(1946, So. Car.), 37 S. E. 2d 537.

In such case the Orangeburg city ordinance required taxicab operators to file with the city a liability insurance policy. An injured person died as result of accident outside of city.

The court (in discussing *Bryant v. Blue Bird Cab Co.*, 202 S. C. 456, 25 S. E. 2d 489) states the said case and this one are different. The Greenville ordinance (*Bryant* case) required security of licensed taxicabs for payment of damages inflicted “on the streets” and arising in the city. These provisions are not in the Orangeburg ordinance, which requires a liability insurance policy for licensing of operations on the streets of the city but does not purport to restrict the application of the insurance to the area of the city. On the contrary, the ordinance clearly contemplates the operation of the taxicabs licensed under it from points within the city to points without. . . . The result indicated is not giving extra-territorial effect to the ordinance. It was passed for the very patent purpose of providing financial protection to the users of taxis licensed by the city for transportation of the public. That such use often entails travel beyond the city limits is within common knowledge.

The power of the City of Pasadena is not restricted; as stated in Section 459(b) of the California Vehicle Code:

“The provisions of this division (Traffic Laws) shall not prevent local authorities within the reasonable exercise of the police power from adopting rules and regulations by ordinance or resolution on the following matters. . . . Licensing and regulating the operation of vehicles for hire.”

Many cases hold that an ordinance may affect indirectly the conduct of persons outside the municipality boundaries by prohibiting such persons from coming within said municipality for business transactions unless and until

certain regulatory measures are observed, certain precautions have been taken, and the preparation and safeguards completed for engaging in the particular business or transaction where such type of business or transactions are affected with a public interest or have certain aspects of the police power involved. This seems the clear rule even though a substantial portion of the transaction may be done outside the municipalities limits; such cases are:

Ebrite v. Crawford, 215 Cal. 724, 12 P. 2d 937;

In re Blois, 179 Cal. 291, 176 Pac. 449;

Korth v. Portland (1927, Ore.), 261 Pac. 895;

Covey Drive Yourself v. City of Portland (1937, Ore.), 70 P. 2d 567.

The territorial coverage of the undertaking of the insurer is *co-extensive with the area of operation* of the assured, and also *with the liability* of the assured. In full support of appellee's position the following cases are cited:

In *Utilities Insurance v. Potter*, 188 Okla. 145, 105 P. 2d 259, the policy was: issued under an ordinance, to pay for injuries to persons from operation of a motor carrier. Plaintiff was transported from Oklahoma to Virginia and to Tennessee; he was injured in both states, and recovered judgments in Oklahoma.

The court held the insurer liable even though plaintiff was injured outside of the state and that the insurer may not contend for any limitation or technical defense because the purpose of the law is to protect the public. The insurer contended that the compulsory portions of the

policy did not apply where the accident occurred outside the requiring sovereignty. The court states:

“ . . . the liability of the insurer is made co-extensive with the liability of the insured in so far as there is legal liability for damages resulting from the operation of such insured carrier . . . the general terms of the policy are applicable and include damage sustained within the territorial limits of the United States and Canada. The ultimate liability of insurer is not fixed by the provisions of the policy where a liability bond is filed as a prerequisite to the issuance of a license, neither the insurer nor the assured may successfully contend that the bond limits the liability imposed . . . we find liability to be co-extensive with the liability of the assured for damages resulting from the operation of any such assured . . . the interest of the law is to put financial responsibility behind the operator . . . as a protection to the people. . . . There is nothing in the language of either which purports to limit the liability of the damages incurred only within the boundaries of this state. The insurer would have us construe such language into the law. This we cannot do.”

In *Northwest Cab v. Central*, 266 Ill. App. 192, recovery was allowed on a policy issued to comply with a legislative requirement for the purpose of securing a license to operate, even though injuries were sustained in an accident 18 miles beyond the city limits. The court stated:

“The prime object of the statute was to protect the public by providing means by which persons injured

by autos owned and maintained by an irresponsible owner should be enabled to collect a judgment . . . against such an owner . . . *There is nothing in the statute which . . . bars an insurance company from . . . extending its liability by its agreement of insurance.* . . . Neither in the policy are there any words limiting the territorial liability of the insurance company. Words limiting its liability could easily have been added to the policy had the defendant so desired. The policy must be construed most strictly against the company issuing it and, in cases of doubt, favorably to the insured, the public in this case.” (Emphasis ours.)

None of the Massachusetts cases, cited by appellant, are here applicable, because of the express limitation in the Massachusetts law. The policies issued in those cases were under the financial responsibility laws of Massachusetts. Examination of that law, which is in Annotated Laws of the State of Massachusetts, Chapter 90, Section 34A, “Compulsory Motor Vehicle Liability Insurance,” in referring to the motor vehicle liability policy, the language is “. . . and arising out of the ownership, operation, maintenance, control, or use *upon the ways of the Commonwealth* of such motor vehicle. . . .” Such policies are thus limited, *by the law, to the ways of the Commonwealth*; the courts, in these cases, could not apply the policies to accidents occurring off “the ways of the Commonwealth” or in other states.

II.

It Was Not Error for the Court to Grant Summary Judgment.

The findings of fact made by the trial court are correct, and find support in the record, as follows:

(a) Finding No. IV [R. 110]. The City of Pasadena ordinance [R. 325] speaks for itself, and clearly implies a declaration of public policy for simple reason it provides the condition precedent of securing a license permit to engage in the business, to rent vehicles, that an insurance contract be obtained and filed, to protect any person that may be injured by a dangerous instrumentality being placed in the possession of unskilled or incompetent persons who are financially irresponsible.

Opinion of Justices, 251 Mass. 569.

(b) Finding No. VII [R. 111]. Appellee's complaint alleges, in substance, that the insurance contract was required by said ordinance [Amended Complaint, Par. VII; R. 8]. This allegation was not denied [Answer to Amended Complaint, R. 63]. Also, see Argument (*supra*) for further reply to appellant's argument.

(c) Finding No. XIII [R. 113]. Appellee's amended complaint alleges that Roy Jordan rented, on or about April 7, 1946, in the City of Pasadena, a Packard automobile, to Sam Richardson for purposes of using said vehicle as a passenger carrying automobile for an initial term expiring April 14, 1946 [Amended Complaint, Par. IX; R. 11]. This allegation was not denied [Answer to Amended Complaint, R. 63; see also Req. 15, R. 72; Answer 15, R. 102]. Appellant's answer denies, only on

information and belief, that Sam Richardson had possession of the automobile on April 9, 1946 [Amended Complaint, Par. IX; R. 11; Answer to Amended Complaint, Par. IX; R. 63]. Appellant admits that the Packard car was in possession of Sam Richardson on April 9, 1946 [Req. No. 1, R. 69; Answer to No. 1, R. 99]; and further admits he drove, operated and used said vehicle, on April 9, 1946 [Req. No. 2, R. 69; Answer to No. 2, R. 99]. It admits there was a collision between appellee and Sam Richardson, at the time and place alleged [Req. No. 7, R. 70; Answer to No. 7, R. 100]; and that said vehicle was involved [Req. No. 5, R. 70; Answer to No. 5, R. 100]; that in Superior Court case No. 515192, appellant admitted the allegation that Sam Richardson was using and operating said automobile, at the time and place mentioned, with the permission, consent and acquiescence of the said defendant, Harry E. Blodgett [Req. No. 11, R. 71; Answer to Req. No. 11, R. 101; see also Int. No. 6, R. 89; Answer to No. 6, R. 97]. In short it is admitted Sam Richardson rented the vehicle, was in possession, drove and operated the same on the day of the accident and had the collision with the appellee. The case, cited by the appellant, *Employers Casualty Company v. Williamson*, is clearly not in point. In that case, the court *found* as a fact that the driver of the truck had a prior *limited* permission to use the truck, and was not within the scope of such permission when the accident occurred. It cannot be argued there is *any limited permission* in this case. Such rental of an automobile, for a period of a week, to a person known to live beyond the city limits where the renting occurs, gives the rentee such exclusive control for said period of time and in manner

and place used, that there is no room to argue any limitation, except perhaps to violate the law, as a narcotics offense, as illustration. Appellant cannot even suggest in what respect, or to what extent, the automobile was not being used with the permission of Roy Jordan [Int. No. 6, R. 89; Answer to No. 6, R. 97]. It has been held, as a matter of law, the renter of a car has the permissive use of it. (*Tuderios v. Hertz*, 70 Cal. App. 2d 192, 160 P. 2d 554.)

(d) Finding No. XVI [R. 113]. The caption of a complaint, as argued by appellant, is clearly no evidence and not controlling as to its substance. The body of the complaint, the evidence adduced, both of which are reflected in the judgment, determines the nature of the award for damages. The judgment in the Los Angeles Superior Court action is supported by findings of fact that appellee's estate and property was injured, wasted, destroyed, taken or carried away [Amended Complaint, Par. XI; R. 12; admitted, Answer to Amended Complaint, Par. V; R. 63].

(e) Finding No. XVII [R. 113-114]. Reference is made to argument on Finding XVI above.

(f) Finding XVIII [R. 114]. This finding is surplusage. It finds against appellant's affirmative defenses which have been stricken; however, it is supported by the record in that appellant admits on or about June 12, 1946, it received its copy of the summons and complaint served on Jordan in Superior Court case No. 515192, and wherein Richardson was a co-defendant [Answer to Int. No. 15, R. 97].

(g) Finding XXIX [R. 117]. The clear intention of the parties is shown that \$3,500.00 paid, by appellant, was

on behalf of and to satisfy a judgment against Roy Jordan, and was not to extinguish nor satisfy any of the separate judgment against Richardson. Appellant has even here been credited by the trial court with such payment [R. 153-155, 177].

(h) Finding XXIV [R. 116]. Reference is made to argument on Finding XVI above.

(i) Finding XXV [R. 116]. This finding is surplusage. It finds against appellant's affirmative defenses which have been stricken; the record is, however, replete with evidentiary support [R. 88, 89, 91, 92, 94, 96, 97, 98, 72, 101].

(j) Finding XXVIII [R. 117]. Reference is made to argument on Finding XIII above.

(k) Finding XXXII [R. 118]. Common knowledge requires no evidence.

III.

Appellee's Two Judgments in Superior Court.

The Superior Court judgment against Sam Richardson remains unsatisfied. See affidavit of George N. Olmstead in support of his motion for summary judgment.

The cases on satisfaction of judgments, cited by appellants, are all *joint* tortfeasor cases, *wherein satisfaction against one discharges* the liability of the other. The policy of the law is, that an injured person can have only one satisfaction for the *injury received*. As expressed in appellant's cited case, *Cole v. Roebbing Const. Co.*, 156 Cal. 443, 105 Pac. 255, the court states, “. . . the only limitation being, that he can have but one satisfaction for the *injury* that he receives . . . *the well settled rule*

is that no bar arises as to any of the wrongdoers until the injured party has received satisfaction, or what in law is deemed its equivalent, and a judgment against one wrongdoer which remains wholly unsatisfied is not such satisfaction." The damages appellee sustained were greater as against Richardson than the damages as against Roy Jordan because of the statutory limitation to \$5,000.00 of liability for an owner. The injured plaintiff is entitled to full satisfaction of damages for his injury against the person causing the injury; likewise the car owner desires a satisfaction of record when he pays and discharges his statutory liability. Such was done in this case. The clear intent was to do no more. If the parties intend to keep the judgment alive, payment will not extinguish it. (*Central Bank & Trust Co. v. Cohn*, 150 Tenn. 375, 264 S. W. 641; *Tompkins v. Powers*, 106 Cal. App. 464.)

The nature of this judgment is distinguishable from that against joint tortfeasors (where there is no right of contribution). In these facts, the owner has subrogation rights against the driver. (Calif. Veh. Code, Sec. 402.) The owner becomes directly liable for the damage done by the driver, in an amount limited by the statute. Such liability is direct and several, as well as joint. Such liability is not dependent upon a judgment against the operator. It is not necessary to sue the operator if the plaintiff is satisfied with the limited judgment against the owner. (*Davidson v. Ealey*, 69 Cal. App. 2d 254, 158 P. 2d 1000.) Payment on the judgment, by the owner, is a *pro tanto* satisfaction, analogous to a surety making payment on a judgment to the limit of its bond which *pro tanto* satisfies the creditor's judgment against the principal. (*Kane v. Mendenhall*, 5 Cal. 2d 749, 56 P. 2d 498.)

IV.

**The Judgment Properly Includes \$5,000.00 as
“Property Damage.”**

Appellant and its assured, by endorsement, added \$5,000.00 property damage coverage to the contract required, by the ordinance of the City of Pasadena [R. 19]. This coverage took on the same character of “compulsory” or “required” insurance as the other coverage provisions of the policy upon which the public is entitled to rely. If the assured and insurer desired (i) to contract for property damage coverage without the ordinance being a part thereof, the insurer would have issued a separate policy which would not have been filed with the City of Pasadena. Appellant’s liability must be measured by its policy, which was to pay \$15,000.00 for personal injuries and \$5,000.00 property damage (*Liberty Mutual Ins. Co. v. McDonald*, 97 F. 2d 497); or, (ii) the insurer, under the logic of the Oklahoma case (*supra*) would have exercised its rights to limit the contract accordingly. This it did not do.

The Los Angeles Superior Court judgment finds that appellee suffered damage to his property [Amended Complaint, Par. XI; R. 12]; not denied [Answer to Amended Complaint, Par. V; R. 63]. The appellant is conclusively bound by this judgment and the issues therein may not be relitigated. (*Kruger v. California Highway Indemnity Exchange, supra*). The California Supreme Court, on just this language and allegation, has broadened the term “property.” (*Hunt v. Authier*, 28 Cal. 2d 288;

Moffat v. Smith, 33 Cal. 2d 905.) Appellee submits the “property damage” suffered by appellee and, as expressed in his judgment, is property and is within the meaning of appellant’s contract. The writing of an insurer is construed in favor of the beneficiary, and against the insurer.

Property Damage Has Been Defined by State Law.

Section 28 of the California Code of Civil Procedure provides: “An injury to property consists in depriving its owner of the benefit of it, which is done by taking, withholding, deteriorating or destroying it.” Section 654 of the California Civil Code provides property to be “The ownership of a thing is the right of one or more persons to possess and use it to the exclusion of others. In this Code, the thing of which there may be ownership is called property.” It therefore clearly appears that appellee has sustained, within the foregoing definitions, “property damage” and that such damage comes within the meaning of the insurance contract annexed to plaintiff’s amended complaint as an exhibit. Particularly is this true in view of defendants’ admissions in the pleadings as hereinbefore specified.

V.

It Was Not Error to Deny Appellant's Motion to Amend Answer. The Judgment of the State Court Is Valid on Its Face.

The allowance of amendments lies in the discretion of the trial court; refusal to permit a proposed amendment is not subject to review on appeal except on abuse of discretion. Laches and delay bars a proposed amendment.

Moore's Federal Practice, Vol. 3, p. 833, citing:
C. E. Stevens Co. v. Foster & Kleiser Co., 109 F.
2d 164.

Amendment to answer, adding a new defense, is not to be allowed where such defense is clearly insufficient.

Canister Co. Inc. v. National Can Corp., 6 F. R.
D. 213.

On March 15, 1950, appellant finally sought out the whereabouts of Sam Richardson [R. 137], although the cause was filed in 1948. On April 10, 1950, appellant's counsel interviewed Sam Richardson in the penitentiary [R. 134]. This cause was judicially decided April 11, 1950 [R. 167]. The summary judgment was ordered April 27, 1950, and judgment entered same date [R. 120-121]. Appellant's affidavit, in connection with the interview with Sam Richardson, was filed May 5, 1950 [R. 167]. It is submitted there is no abuse of discretion when the record clearly shows appellant's delay and dilatory action.

Much of appellee's showing in (i) his "Statement of Facts and Pleadings" herein and in (ii) the affidavit of appellee's counsel, in opposition to appellant's Motion for New Trial, is for the purpose of showing *actual* knowl-

edge by *Richardson* of the existence of appellee's judgment in the state court against him, starting with (a) the service by Roy Carter of the Summons and Complaint on August 3, 1946 [R. 159], at which time Richardson declared "Oh, that is something that happened three or four months back" [R. 161], (b) together with appellee obtaining the Writ of Execution which, by the Sheriff of Los Angeles, was levied on all of Richardson's personal effects on February 17, 1947 [R. 152], and that a sheriff's "custodian or keeper, in possession" thereunder continued regularly until about October 1, 1947 [R. 152], (c) together with the California State Department of Motor Vehicles' "Order of Suspension" of Richardson's driver's license, dated February 7, 1947, and the sending registered mail by said Department, to Richardson said "Order" on February 7, 1947 [R. 162, 163, 164]. Richardson is also chargeable with *constructive* notice by appellee's recording, with the Recorder of the County of Los Angeles, his Abstract of Judgment on September 18, 1946 [R. 330, 331]. It may reasonably be *inferred* that further *actual* knowledge came to Richardson in the obtaining of a search of title in connection with his later sublease of certain real property [R. 153] which would disclose the existence of the prior recorded Abstract of Judgment. Further, *appellant* itself had early *actual* notice that appellee was endeavoring to obtain satisfaction of his judgment against Richardson. This is evidenced by (i) counsel's letter of April 21, 1947 [R. 154, 155], and that (ii) appellee was continuing his efforts towards collection [R. 155]; (iii) that *this cause* has been pending upon appellant's removal to the Federal Court, since Sept. 24, 1948 [R. 156]. The aforesaid showings on notice were supplementary and in addition

to *this appellant's knowledge* of plaintiff's urging his claims as made in appellee's suit wherein appellant participated as early as June 12, 1946 [R. 97, at answer No. 15]. These facts are very material, in that, down to the date of the entry and docketing of this Summary Judgment herein, this appellant made *no* attempt by petition (i) in interpleader or (ii) for declaratory relief, or (iii) direct attack, (iv) or otherwise, to clear itself regarding appellee's state court judgment against Richardson [R. 95, Interrogatory 34; Answer No. 34; R. 99].

The California state rule is thus raised (even as to the argued grounds of physical omission of service of process on Richardson) that laches and estoppel is raised in a proceedings involving even *direct* attack (*Penland v. Goodman*, 44 Cal. App. 2d 14, 111 P. 2d 913, or in a direct attack by an independent action in equity (*Bouvette v. Layer*, 40 Cal. App. 2d 43, 104 P. 2d 115; *Wattson v. Dillon*, 6 Cal. 2d 33, 56 P. 2d 220; *Cadenasso v. Bank*, 214 Cal. 562, 6 P. 2d 944; *Canadian v. Clarita*, 140 Cal. 672, 74 Pac. 301; *Smith v. Jones*, 174 Cal. 513, 163 Pac. 890); where the judgment roll shows on its face service of process on a defendant, but in fact, by extrinsic evidence, it could be shown that such service was omitted or improper, it is said “. . . the motion must be made at a reasonable time or the right to make it is lost,” and that one year is the maximum period within which to bring such motion.

Appellee submits that a Federal Court cannot, *on these issues*, set aside, modify or collaterally impeach a final judgment of a state trial court of general jurisdiction. (*Aldrich v. Barton*, 153 Cal. 488, 95 Pac. 900.) Any such or subsequent attack can *only* be made in *the* judicial system of the state as controlling the trial court awarding

the judgment. (*Butler v. McKey*, 138 F. 2d 373, cert. den., 64 S. Ct. 636; *Fisch v. Superior Court*, 6 Cal. App. 2d 21, 43 P. 2d 855; *Estate of Estrem*, 16 Cal. 2d 563, 107 P. 2d 36; *Gould v. Richmond*, 58 Cal. App. 2d 497, 136 P. 2d 864; *Isenberg v. Superior Court*, 193 Cal. 575, 226 Pac. 617; *Malema v. Malema*, 103 Cal. App. 79, 283 Pac. 956; *Hunt v. United*, 79 Cal. App. 2d 619, 180 Pac. 2d 460.) Only the judgment debtor is a party properly to attack such judgment. (*Young v. Fink*, 119 Cal. 107, 50 Pac. 1060; *Altpeter v. Postal Telegraph*, 25 Cal. App. 255, 143 Pac. 93.) Where a judgment debtor was not served with process, but knowing of the existence of the judgment based upon such error or omission in service, laches and estoppel are in issue. (*Palmer v. Lantz*, 215 Cal. 320, 9 P. 2d 821; *Altpeter v. Postal Telegraph* (*supra*); *Gardner v. Gardner*, 72 Cal. App. 2d 270, 164 P. 2d 500; *Gregory v. Ford*, 14 Cal. 138.) Actual notice is the test. (*Gardner v. Gardner* (*supra*); *Thompson v. Sutton*, 56 Cal. App. 2d 272, 122 P. 2d 975; *Wheeler v. Craig*, 206 Cal. 221, 273 Pac. 558.)

Additionally, any such attack on a judgment must show that the attacking party has a valid, bona fide defense (*Kupfer v. McDonald*, 19 Cal. 2d 566, 122 P. 2d 271), and must show in addition that a different result would obtain (*Elms v. Elms*, 72 Cal. App. 2d 508, 164 Pac. 936; *Van Teger v. Superior Court*, 7 Cal. 2d 377, 60 P. 2d 581; *Beard v. Beard*, 16 Cal. 2d 645, 107 P. 2d 385), and that a good and meritorious defense exists (*Osmont v. All Persons*, 163 Cal. 587, 133 Pac. 480); mere allegations of a meritorious defense, without a sufficient showing of

probative facts, are insufficient to constitute an allowable attack (*Brazee v. Olsen*, 116 Cal. App. 641, 3 P. 2d 68).

A judgment valid and sufficient on its face cannot be collaterally attacked (*Kaufman v. California Mining*, 16 Cal. 2d 90, 104 P. 2d 1038; *Marlanee v. Brown*, 21 Cal. 2d 668, 134 P. 2d 770; *Burroughs v. Burroughs*, 10 Cal. App. 2d 749, 52 P. 2d 606; *Rico v. Nasser*, 58 Cal. App. 2d 878, 137 P. 2d 861; *City of Salinas v. Lee*, 217 Cal. 252, 18 P. 2d 335; *Pena v. Bourland*, 72 Fed. Supp. 295); and all presumptions are in support of the judgment (*Bennet v. Hunter*, 155 F. 2d 223; *People v. Bogart*, 58 Cal. App. 2d 831, 138 P. 2d 360; *Feig v. Bank of Italy*, 218 Cal. 54, 21 P. 2d 421), wherein it is said concerning a judgment valid on its face, the attacking party “. . . cannot now collaterally attack on the grounds urged (non-service). It is well settled that evidence outside the record is not admissible on collateral attack to show that summons was not served . . . if the fact of non-service does not appear from inspection of the judgment roll, it cannot be shown by extrinsic evidence” (*Crouch v. Miller*, 169 Cal. 341, 146 Pac. 880; *City of Los Angeles v. Glassell*, 203 Cal. 44, 262 Pac. 1084; 15 Cal. Jur. 69); no extrinsic evidence can be allowed to impeach a judgment valid on its face. (*Burroughs v. Burroughs*, *supra*; *People v. Goodhue*, 80 Cal. 199, 22 Pac. 66; *Barstow-San Antonio Oil Co. v. Whitney*, 205 Cal. 420, 271 Pac. 477; *Spahn v. Spahn*, 70 Cal. App. 2d 791, 162 P. 2d 53.) The sole remedy available to Richardson is in a new action in equity, *People v. Bogart*, *supra*.

A party seeking to attack a judgment must show diligence and freedom from fault. (*Wattson v. Dillon*, *supra*; *Hasner v. Skelly*, 72 Cal. App. 2d 457, 164 P. 2d 573.)

The cases cited by the appellant illustrate the rule of the Federal courts to look to the law of jurisdiction where the judgment was rendered. If a remedy is available under state law, such is applied. This court is bound by the California law, and as above stated from the California cases.

A judgment imports verity; its recitals may not be challenged in a collateral proceeding by parol testimony.

Thomas v. Hunter, 153 F. 2d 834;

Pena v. Bourland, 72 Fed. Supp. 290.

It is submitted the fact of nonservice cannot become an issue here in this case. A direct attack in the state court is the only relief open to Richardson. Even arguing, but not conceding, jurisdiction here for such purpose, there is no genuine issue of fact when the evidential source and entire strength of appellant's position is the affidavit of Sam Richardson, a convicted felon, incarcerated at the time he deposed the allegation of nonservice.

Under State Rules, Conditions Are Imposed Before Success Is Allowed to an Attack on a Judgment.

Any modification of an existing judgment cannot be unconditionally granted (*Tucker v. Tucker*, 59 Cal. App. 2d 557, 139 P. 2d 348), and such conditions imposed include ample compensation in an amount that is severe in proportion to the circumstances. (*Watson v. San Francisco*, 41 Cal. 17; *Nicol v. Weldon*, 130 Cal. 666, 63 Pac. 63; *Gray v. Lawlor*, 151 Cal. 352, 90 Pac. 691.)

Motion to Strike.

As shown earlier in this brief, appellant has not appealed from *the separate order* striking the affirmative defenses of the appellant. It would therefore appear that the inclusion in the record of those stricken defenses [to wit: (1) at page 64, on the sixth line from the top of the page, the remainder of said paragraph, starting with the phrase “further answering said paragraph . . .” and through the two word line ending “. . . by default.” (2) at page 65, at “II,” the paragraph starting on the first line of said paragraph with the words “. . . alleges that it was provided . . .” and continuing on through the balance of said page, and through the remainder of said paragraph as it is completed on page 66. (3) at pages 66, 67 and 68, at “I” on page 66, through the remainder of said page, all of page 67, and the first five lines of page 68, ending with the phrase “. . . prejudice of the defendant.”] is improper.

Counsel has, by implication, raised the substance in his contention that the defenses should not have been stricken. Appellee, by this mention, does not waive the point that appellant has not appealed therefrom, desires only to provide against possible adverse interpretation of the Federal Rules and to contend that the trial court struck the said affirmative defenses upon any of the following sufficient theories to justify the said order.

(a) The contract of protection, annexed as an exhibit to the complaint, is “required” or “compulsory” or absolute as against the insurer (*Kruger v. California Highway Indemnity Exchange, supra*), and there are no defenses thereto.

(b) The contract, appellee's exhibit, by its terms, *guarantees* to a judgment creditor payment of the stated amounts. The very word "guarantee" is repugnant to any argument that savors of a condition subsequent; for illustration, that any act or omission of an additional insured, after the accruing of the cause of action which results in the judgment, would set at naught the third party beneficiary rights already vested as against the insurer.

Federal Rules of Civil Procedure, Rule 56.

The rule providing for summary judgment proceedings is, in part, (1) available upon all or any part of a cause (Sec. a); (2) the resisting party may use counter-affidavits (Sec. c); (3) the trial court determination thereof shall be discretionary with the court if the court concludes that the documents on file show that there is no genuine issue as to any material fact, that the moving party is entitled to judgment as a matter of law (Sec. c); (4) and may resolve liability independently of or aside from the amount of damages (Sec. c); (5) the court shall examine the documents on file, the evidence, by interrogating counsel, and ascertain what material facts exist without substantial controversy as opposed to what material facts are, in good faith, actually controverted; the court shall make such disposition therein as is just.

Affidavits used in such proceedings shall be on personal knowledge, in form as to show facts which would be admissible in evidence on a trial. Certain leeway is provided so that the resisting party can fully show all claimed material facts (Secs. e, f).

Federal Rules of Civil Procedure, Rule 12.

The rule pertaining to motions, and particularly, subsection “f,” pertaining to striking portions of pleading which portions are immaterial or constitute no legal issue, appears not here involved only for the appellant omitting such an appeal from its Notice of Appeal. The trial court is empowered to rule on the legal sufficiency of an affirmative defense, under such section, and has a wide discretion therein. (*De Gennaro v. Pennsylvania R. Co.* (Pa.), 68 Fed. Supp. 269; *Tivoli Realty v. Paramount Pictures* (Del.), 80 Fed. Supp. 800; *Sinkbeil v. Handler* (Neb.), 7 Fed. Rules Dec. 92; where such defenses constitute no legal issue, *Hills v. Price* (S. C.), 79 Fed. Supp. 494; *Bath Mills v. Odom*, 168 F. 2d 38, cert. denied 335 U. S. 818; *Salem Eng. v. National Supply* (Pa.), 75 Fed. Supp. 993.)

Absence of Genuineness of Issues as to Appellant.

Appellant has, in its pleadings, *i.e.*, its allegations in its answer and position taken in open court as compared to its answers given to Appellee’s Requested Admissions and Appellee’s Interrogatories, demonstrated such inconsistency and disregard for substantial facts that appellee contends such be sham, frivolous and insubstantial matters. These inconsistencies are illustrated as follows:

(a) The answer, at paragraph III [R. 63], answering complaint, paragraph IX [R. 11], denies, on information and belief, Richardson’s possession of the auto. However, at XX [R. 99, 100, 101] possession is admitted by Numbers 1, 2, 5, 6, 7, 8, 11.

(b) The answer, at II [R. 63], denies generally and specifically appellee's paragraph VIII, as to the substance of appellant's own endorsement treated in this brief at I, A, (6); on page 9, which substance is ascertainable by a simple reading. The contract is not questioned. Appellee alleged, at III [R. 15], the contract to be in full force and effect. Appellant admitted [R. 65, 66] in its answer, said allegation.

(c) The answer, at IV [R. 63], generally and specifically denies appellee's paragraph X allegations that Richardson drove, operated and used the automobile on April 9, 1946, with the permission and consent of Blodgett or Jordan. Yet Appellee's Requested Admissions [R. 69] Numbers 1, 2, 3, 4, 7, 8, 11, 12, 15, all expressly or indirectly touch on such issue. Appellant's answers thereto [R. 99, *et seq.*] directly and by clear inference admit the consent and permission. Appellee's interrogatories, at [R. 89] Numbers 6, 8, 9, 11, also go to this issue. Appellant's answers thereto [R. 96] likewise directly and by clear inference admit the consent and permission.

(d) The answer, at V [R. 63], denies on information and belief, appellee's allegations, paragraph XI [R. 11], of the accident, appellee's injury and damage as a result of the collision, at the time and place when Richardson drove into appellee; yet Appellee's Requested Admissions [R. 68, *et seq.*], Numbers 5, 6, 7, 8, 11, 12, and Interrogatories [R. 87] Numbers 7, 8, 9, 15, 17, 18, 19, appellant's answers thereto admit what theretofore appellant had denied.

(e) The same circumstance exists exactly with respect to appellee's allegations, paragraph XII [R. 12], of Sam

G. Richardson being the one and the same person who rented the car, was in possession, drove and was involved in the accident, and was sued. Appellant's answers to Appellee's Interrogatories and Request for Admissions is directly to the contrary.

(f) Appellant in its answer at VIII [R. 65] expressly denied appellee's allegations of paragraph XIV [R. 13] that appellant had been compensated for any risk taken or protection afforded with respect to Richardson. Appellant answered [R. 101] Appellee's Requested Admissions, Number 13, directly to the contrary and admitted receiving full payment pursuant to the many schedules and formula as set out in the contract.

(g) Appellant specifically denies, at VIII [R. 65], the allegations of XVI [R. 13] of the complaint that appellee is an additional assured. Examination of the exhibit annexed to the complaint, at III (2) [R. 23], shows but one possible conclusion directly to the contrary.

(h) Appellant specifically denies, at VII [R. 64], appellee's allegations in paragraph XIII [R. 13] that appellant had notice of the time, place and circumstances of the collision wherein appellee was damaged, on April 9, 1946. Compare this, however, to the answer, Number 17, to Interrogatory Number 15 [R. 97] admitting notice received June 12, 1946, by appellant, setting out the time, even down to the hour, place and persons involved and extent of damage. Appellant then commenced its investigation of the entire occurrence [Interrogatory No. 16, R. 91, and Answer No. 16, R. 97]; and on December 19, 1946, appellant discussed the matter with Richardson [Answers Nos. 20-21, R. 97-98]. Appellant admits [In-

interrogatories by Appellee, Nos. 2, 3, 4, 5, 10, 28] to not having examined the investigatory records of the Police Department, Sheriff's Office, California State Highway Patrol offices, even as late as March 29, 1950 [R. 99] and April 7, 1950 [R. 102] in connection with this casualty of April 9, 1946, wherein or to which appellant had an outstanding "guarantee" undertaking. During all this time, and now appellant seeks to rely upon and stand on lack of knowledge of the facts.

(i) Appellant denies, at VI [R. 64], appellee's allegations at XV [R. 13], that appellee's judgment against Richardson is not paid nor satisfied. Appellees evades, by sham, a direct answer. See Interrogatory No. 31 [R. 95] and answer thereto, No. 31 [R. 98], and appellee's affidavit in support of motion for summary judgment.

(j) Appellant specifically denied, at VIII [R. 65], appellee's allegations, at paragraph XVI [R. 13], that appellant's undertaking included taxed costs of court, interest, as and in addition to the amount of a final judgment. But compare appellee's showing, at I (A), (2), (6), and (I) (B), (2), (3), (4), (7), (8) of "Statement of Pleadings" in this brief.

Next considering the answers to Appellee's Requested Admissions [R. 68, *et seq.*], and Interrogatories [R. 87]:

(a) Requested Admission Number 3, appellant only denies permission and consent at the instant and minute precise location of the collision between appellee, a pedestrian, and Richardson. But appellant, answering Request Number 15, admits: that the Packard automobile was rented in Pasadena, Calif., April 7, 1946, for a period of one week, expiring April 14, 1946, to Richardson; at Request Num-

ber 9, admits that as of April 7, 1946, Richardson gave to Jordan his residence address as 836 South San Gabriel Boulevard, San Gabriel, Calif.; further admits [at Requests Nos. 1, 2] that the car was a Packard automobile, 1940 model, and on the date of the accident, namely, April 9, 1946, in Richardson's possession; further admits [at Request No. 5] that the same Packard car was involved in the collision with appellee; further admits [Requests Nos. 2, 7, 8] that Richardson was the driver; further admits [Request No. 6] the collision and damages sustained was the basis of the Superior Court suit and judgment, involved here; and was so convinced of culpable wrong on the part of the registered owner, with respect to statutory liability of an owner, and identification of appellee, and of appellee being the innocent victim of said collision, as a result of an automobile covered by appellant's insurance, that appellant [Request No. 12] stipulated to judgment against Jordan in the sum of \$3,500.00 and paid said sum, all as an aftermath of this collision; further admits [Request No. 11] that appellant prepared a verified pleading of answer wherein consent and permission by Jordan extended to the time and place involved, for the Packard automobile in question. In response to Interrogatory Number 6, appellant admits it has no claim of knowledge or theory that the Packard was not being operated with the permission and consent of Jordan at the certain time and place. Yet, during this same period, appellant admits [Interrogatory No. 27] to having seven full-time investigators.

(b) Appellant pleads ignorance of the conduct or use of automobiles rented by Jordan, in the sense of where they are driven, while such automobiles are in the hands

of some rentee [Interrogatory No. 33], yet the examination of the contract prepared and delivered by appellant, annexed as an exhibit to the complaint, shows the automobiles to be rented by Jordan as drive-ur-self or U-drive types.

(c) Appellant makes claim that it had no opportunity to learn the facts of the accident or participate in the defense of Richardson. Appellant did receive full cooperation from Jordan [Requested Admission No. 14, Interrogatory No. 24] as the bailor or lessor of the car, received about June 12, 1946, the summons and complaint which indicated the driver, Richardson, was also a co-defendant with Jordan; that appellant was thereafter active and participating in said case [Requested Admission No. 12] and investigated promptly the circumstances [Interrogatory No. 16; appellant talked with Richardson, the driver, about the accident about December 19, 1946 [Interrogatory No. 20], but appellant never requested Richardson's assistance, personal attendance or cooperation within the terms of the insurance contract [Interrogatories Nos. 21, 23]; that as a result of the conversation with Richardson, appellant developed no facts nor information which would have, through Richardson, assisted them in their defense [Interrogatory No. 22].

(d) Appellant admits that it made no attempt, in 1946, or thereafter, to perform its duty of defense on behalf of Richardson [Interrogatory No. 30] nor to take any steps to intervene, save or protect the liability of Richardson nor of appellant prior to appellee's motion for summary judgment [Interrogatory No. 34]; and that nothing has developed which in any wise prejudices appellant [Interrogatory No. 26] under its voluntary contract of guar-

anteeing responsibility to such persons as might be damaged and who thereafter recover a final judgment.

Appellee submits that in a determination of the appellate issues of a summary judgment, and the determination of the genuineness of the claimed factual issues, the court can and indeed should examine the claims and positions of the appellant, to consider not only what was said or pleaded, but also how it was said and the basis of the statement. Appellee feels that he has herein demonstrated the insincerity of the issues contended by appellant and that no substantial issue exists.

Summary Judgment Under Rule 56, F. R. C. P.

The purposes pertinent here of the Federal provisions for summary judgment are (a) to expedite litigation, (b) to avoid trials of unnecessary factual issues, (c) to avoid unnecessary lengthy trials on such issues, (d) to ascertain if, in fact, substantial material, genuine issues of fact remain and are controverted, (e) to do justice under a proper case. A trial court, on such a proceeding, has certain wide, judicial discretion.

Rogers v. Girard Trust (Ohio), 159 F. 2d 239.

A trial court thus is empowered to examine all filed pleadings and documents, and to consider all the allegations, statements and positions of the contending parties, for the purpose of a penetrating and piercing over-all analysis of a litigant's position and status, the effect thereof, and the consequences. This judicial right in the case at bar has in it, the inherent further scope of looking to the evidential sources of appellant's claims or allegations, in order to obtain judicial perspective and objec-

tiveness in evaluating and determining the situation and status of this same litigant. (*Pen-Ken Gas v. Warfield* (Ky.), 137 F. 2d 871; cert. den., 320 U. S. 800, 88 L. Ed. 483.)

The objective of this judicial deliberation is principally to determine if a genuine, substantial issue of fact further exists as should entitle a trial on the merits of a factual question (*Roepke v. Fontecchio* (Cal.), 177 F. 2d 125; *Christianson v. Gaines* (D. C.), 174 F. 2d 534; *Finlay v. Union Pacific*, 6 F. R. D. 284) as to squeeze out immaterial or insubstantial matters. (*Bellanger v. Hodeman* (Me.), 6 F. R. D. 459.

The judicial determination of this issue may be contrary to and despite the formal pleadings of this same litigant. (*Pen-Ken Gas v. Warfield*, *supra*; *N. Y. Life v. Cooper* (Okla.), 167 F. 2d 651; cert. den. 335 U. S. 819.)

In general support of this same proposition (*Town of River Junction v. Maryland* (Fla.), 110 F. 2d 278, cert. den. 310 U. S. 634; *Porter v. Jones* (Okla.), 176 F. 2d 87; *Griffith v. Wm. Penn* (Pa.), 4 F. R. D. 475), liability may be thus concluded with damages to be subsequently assessed. (*Truncale v. Blumberg*, 8 F. R. D. 492.)

This judicial prerogative, from the authorities, appears to extend to the trial court's conclusion from all the record (*Battista v. Horton, Myers & Raymond* (D. C.), 128 F. 2d 29; *Continental Illinois Nat'l Bank v. Ehrhart* (Tenn.), 1 F. R. D. 199) as to the over-all effect of the entire matter considered (*Burnham Chemical v. Borax* (Cal.), 170 F. 2d 569, cert. den. 336 U. S. 924; *Pofe v. Continental Insurance* (Ill.), 161 F. 2d 912, cert. den. 332 U. S. 824; *Gifford v. Travelers Protective* (Cal.), 153 F.

2d 209; *Keele v. Union Pacific* (Cal.), 78 Fed. Supp. 678; *Bowles v. Batson* (S. Car.), 61 Fed. Supp. 839, affd. 154 F. 2d 566; *Sprague v. Vogt*, 150 F. 2d 795; *Cohen v. 11 W. 42nd St.* (N. Y.), 115 F. 2d 531; *Seward v. Nissen*, 2 F. R. D. 545; *La Salle v. Kane* (N. Y.), 8 F. R. D. 625; *Ortiz v. National Liberty* (Puerto Rico), 75 Fed. Supp. 550; *Dickinson v. Mellas* (Ill.), 81 Fed. Supp. 626; *Nostrand v. U. S.* (N. Y.), 59 Fed. Supp. 245) and in spite of (1) the allegations in the answer of this particular appellant to the contrary, (2) the feigned or colorable issues contended to be framed in the pleadings (*Griffith v. Wm. Penn*, *supra*), (3) this appellant's claim of the existence of a factual issue or a need to take testimony to resolve an issue, which in fact is not a real or substantial issue. (*Loughman v. Braun* (N. Y.), 43 Fed. Supp. 315.)

A further purpose of such proceedings is to escape trial of issues where they are only frivolous or sham. (*U. S. v. Conti* (N. Y.), 27 Fed. Supp. 756.)

Where it is (a) clear what the truth is (*Butcher v. United Electric* (Ill.), 174 F. 2d 1003); *Crosby v. Oliver* (Ohio), 9 F. R. D. 110), and (b) there is non-existence of facts sufficient to constitute a defense (*Kelly v. R. F. C.*, 172 F. 2d 865), or (c) where the claimed factual issue sought to be tried is immaterial (*Finlay v. Union Pacific* (Kan.), 6 F. R. D. 284), or (d) is insubstantial (*Toebelman v. Missouri-Kansas Pipe*, 130 F. 2d 1016; *Cohen v. 11 W. 42nd St.*, *supra*), as (e) to leave no room for legitimate controversy, then a (1) mere pleaded denial, as the general issue, or as a (2) conclusion of law (*Norton v. Fairclough* (N. J.), 72 Fed. Sup. 308; *Garrett v. American University* (D. C.), 163 F. 2d 265), or a (3)

denial in form, but inconsistent substance by way of comparison to an uncontroverted exhibit (*La Salle v. Kane, supra*), is insufficient to resist or overcome a motion for summary judgment. (*Piantadosi v. Loews* (Cal.), 137 F. 2d 534; *Kelly v. R. F. C., supra*; *Imported Liquor v. Los Angeles Liquor* (Cal.), 152 F. 2d 549; *Carr v. Goodyear Tire* (Cal.), 64 Fed. Sup. 40; *Schreffler v. Bowles* (Colo.), 153 F. 2d 1, cert. den. 328 U. S. 870; *Averick v. Rockmont* (Colo.), 155 F. 2d 568.) To resist such a motion, after appellee had shown a *prima facie* entitlement to judgment, appellant must specify, justify and show substantial, admissible, competent evidence (*Seward v. Nissen* (Del.), 2 F. R. D. 545) in support of its position, as to constitute plausible grounds for its defense, which would tend to change the result (*Pen-Ken v. Warfield, supra*; *Gifford v. Travelers, supra*; Federal Rules Civil Procedure, Rules 12a, 60b; *Bowles v. Branick*, 66 Fed. Supp. 557; *Clare v. Farrell* (Minn.), 70 Fed. Supp. 276; *Jameson v. Jameson* (D. C.), 176 F. 2d 58) and would be reasonable, or not incredible, or not without probative force when accepted by reasonable minds (*Miller v. Miller* (D. C.), 122 F. 2d 209; *Whitaker v. Coleman* (Ala.), 115 F. 2d 305). Appellant made no request for additional time to garner facts within the meaning of *Stanolind Oil v. Doyle* (Tex.), 38 Fed. Supp. 893, aff'd 123 F. 2d 900, and cannot now complain of the disposition by summary judgment. (*Rothberg v. Dodwell* (N. Y.), 152 F. 2d 100.)

Where, as here, appellant failed to oppose appellee's motion for summary judgment by any counter-affidavits or any showing of facts, then all of appellee's showing is taken as true for the purposes of the motion. (*Wolfe v. Union Transfer* (Ky.), 48 Fed. Supp. 855; *Allen v. R.*

C. A. (Del.), 47 Fed. Supp. 244.) As appellee views this effect, there was therefore, or can be, no contention by appellant that any genuine factual issues remained. Said another way, appellant admitted (*Allen v. R. C. A.*, 47 Fed. Supp. 244; *Port of Palm Beach v. Goethals* (Fla.), 104 F. 2d 706) there was, then and there, no remaining factual issue. In the particular facts here, where appellant controlled the defense in the state court action wherein appellee as plaintiff took his judgments against Richardson and others, which Richardson judgment is here a basis of appellee's action against appellant, the bar of *res adjudicata* against appellee, is available to appellee, and appellee urges said bar to its complete extent under the rules pronounced in *Hersog v. Des Lavriers Steel* (Pa.), 46 Fed. Supp. 211, to entitle appellee to his summary judgment being affirmed. (See also *Eller v. Paul Revere Life Ins. Co.*, 138 F. (2d) 403; *Gifford v. Travelers* (Cal.), 153 F. 2d 209; *American Insurance v. Gentile* (Fla.), 109 F. 2d 732, cert. den. 310 U. S. 633; *Belanger v. Hopeman* (Me.), 6 F. R. D. 459.) As was shown in the paragraph next preceding, a denial, without more, is insufficient. Certainly, since Rule 56 provides certain requirements to be embodied in an affidavit (*Engl v. Aetna* (N. Y.), 139 F. 2d 469) to oppose such a motion (*Walling v. Fairmont Creamery* (Neb.), 139 F. 2d 318; *Seward v. Nissen*, *supra*), argument by appellant's counsel cannot, unaccompanied by such affidavit (*Fishman v. Teter* (Ill.), 133 F. 2d 222), constitute a sufficient or any showing of the existence of any genuine or substantial issue of fact, as to defeat the motion. Appellee is, therefore, entitled, as a matter of law, to his summary judgment. (*Home Art v.*

Giensder (N. Y.), 81 Fed. Supp. 551; *Fletcher v. Krise* (D. C.), 120 F. 2d 809, cert. den. 314 U. S. 608.)

Other matters available to a trial judge on a hearing on such a motion are: (a) verified pleading of the resisting party in a prior suit (*Eberle v. Sinclair Oil* (Okla.), 35 Fed. Supp. 296, aff'd 120 F. 2d 746), and, of course, judicial knowledge and common knowledge (*Fletcher v. Evening Star* (D. C.), 114 F. 2d 582, cert. den. 312 U. S. 694). On such a motion, appellant as the resisting party must disclose fully existence of issues, if any, and what the evidence will be in support of such issues if they were to be tried (*Carr v. Goodyear, supra*), and fully reveal its technical position by shedding any light on the meaning of allegations of its answer or issues as would be opposition to the motion. (*Bowles v. Ward* (Pa.), 65 Fed. Supp. 880.)

The trial court is empowered to determine summarily if no further genuine issue exists, on such showing as was made. (*Pen-Ken v. Warfield, supra*; *Byron-Jackson v. U. S.* (Cal.), 35 Fed. Supp. 665; *Fox v. Johnson* (D. C.), 127 F. 2d 729.) It is settled law that the trial court is presumed to have acted correctly in its disposition, at least until the contrary is shown; no probable error, in the trial court's judgment, is here made to appear. (*Carr v. Goodyear, supra*.)

A trial court, in disposing of such a motion, may, but is not, required to provide Findings of Fact in support of its judgment. (*Lindsey v. Leavy* (Wash.), 149 F. 2d 899, cert. den. 326 U. S. 783; *Prudential v. Goldstein* (N. Y.), 43 Fed. Supp. 767; *Jarrett v. Norfolk*, 74 Fed. Supp. 585, affd. 169 F. 2d 409, cert. den. 335 U. S. 886.)

Inasmuch as each case varies in its circumstances, the peculiar facts control disposition in the Appellate Court of the judgment awarded on motion for summary judgment. (*Pen-Ken v. Warfield, supra*; *Calif. Apparel v. Wiedner* (N. Y., 68 Fed. Supp. 499, affd. 162 F. 2d 893.)

Further, a summary judgment is available to all or part of appellee's suit. (*McDonald v. Batopilas* (N. Y.), 8 F. R. D. 226.) If any portion hereof is severable from any other, disjunctive appellate consideration appears proper.

Appellant's Affirmative Defenses, Under These Facts, Constitute No Legal Defense.

All of the affirmative defenses, sought by appellant to be included as factual issues framed in its answer to appellee's amended complaint, are, principally, as questions of law, no defenses under the peculiar facts of this case.

Appellant has pleaded want of knowledge, lack of notice, omission of forwarding Summons and Complaint, lack of cooperation, omission of attendance, etc., and such technical types of legal defenses as appellant chose to include in the printed portions of its contract under "Conditions" at R. 57, *et seq.* Appellee has collected a very great number of authorities on such questions. These issues are inapplicable to a type of contract as a "compulsory" or "required" insurance but which may, in a proper case, be applicable in the ordinary insurance contract as is not required or compulsory. Unless this court feels they would be helpful, appellee does not now desire to add to this already lengthy brief, the citations in detail on those propositions, but appellee will cite merely text references where all of such defenses are discussed and the non-applicability, here, of such questions is shown. The

factual circumstances, wherein such defenses are not applicable, are contained in the record and are principally set out in appellee's "Request for Admissions" and "Interrogatories" and appellant's answers thereto, and among others include:

(a) An insurer has definite duties to defend those protected within its contract, 45 C. J. S. 1054, Sec. 932, notes 73 74, 77-79; 1055, Sec. 933, and three courses, among others, are open to an insurer to avoid its unanticipated liability. (1) to defend, (2) to settle and (3) to pay to the entitled party the amount provided in the contract, and where the insurer omits its provided defense, such excuses compliance with the cooperation provision, 45 C. J. S. 1060, Sec. 933, note 38;

(b) The cooperation provision is designed to prevent collusion, 45 C. J. S. 1062, Sec. 934b and note 64. Cooperation is due *only when requested* by the insurer, 45 C. J. S. 1065, Sec. 934, note 76;

(c) An insurer is bound to assert all efforts to ascertain facts, as would a reasonably prudent person. 45 C. J. S. 1065, note 77;

(d) Failure of compliance with a cooperation clause is immaterial unless substantial prejudice results to the insurer. 45 C. J. S. 1065, note 80; p. 1067, Sec. 934, note 87;

(e) In the absence of an express request by the insurer to a party to cooperate, the insurer has no defense. 45 C. J. S. 1067, note 91;

(f) Notice of claim or suit is unnecessary where the insurer has actual knowledge, 45 C. J. S. 1215, Sec. 983, note 46, and technical notice is immaterial where the insurer has actual notice and a third party beneficiary's

rights have vested. 45 C. J. S. 1273, Sec. 1047, note 86; 46 C. J. S. 123, notes 9, 10, 11;

(g) Omission of notice or forwarding of process by an additional assured is immaterial unless the insurer shows substantial prejudice. 45 C. J. S. 1275, note 97; Sec. 1051, note 3;

(h) Any reasonable notice, by *any* person, within a reasonable time under all the surrounding circumstances fulfills the provision. 45 C. J. S. 1277, Sec. 1053, notes 15-16;

(i) Delay of notice or forwarding of process or omission of forwarding of process is immaterial excepting where the insurer shows substantial prejudice. 45 C. J. S. 1278, Sec. 1055; p. 1279, note 31; 46 C. J. S. 123, note 2. Such prejudice to an insurer must be actual. 45 C. J. S. 1278, Sec. 1055; p. 1279, note 31;

(j) The ignorance of a duty, if any, by an additional assured excuses his compliance with the technical provisions of the policy. 45 C. J. S. 1282, Sec. 1056b, and to constitute any real grounds of defense, an omission in compliance must be substantial and material. 45 C. J. S. 1284, Sec. 1057, note 70;

(k) The circumstances of the particular case justify or refuse the waiving of the application of these requirements. 45 C. J. S. 1286, note 94;

(1) An investigation promptly commenced by an insurer is sufficient to waive compliance with respect to notice. 45 C. J. S. 1287, Sec. 1061, notes 10-11;

(m) Where the contract creates third party beneficiary rights no act or omission by the contracting parties, subsequent to the vesting of a beneficial interest, can destroy

said vested benefits. 44 C. J. S. 543, note 91; 46 C. J. S. 120, Sec. 1191(6), and p. 120, note 86; p. 122, notes 4, 5; p. 123, note 2; p. 123, Sec. 1191, notes 7-11;

(n) Where the insurer has actual notice of the pendency of the action and has the opportunity to protect itself against untoward or unanticipated liability of the assured, no defense is available for want of notice. 46 C. J. S. p. 257, Sec. 1251, and note 17; p. 258, note 18.

(o) A judgment against the assured is conclusive against the insurer in a later action, 46 C. J. S. 257, n. 19; such prior action determines the liability of the insured, consent, etc., and therefore determines the liability of the insurer. (46 C. J. S. 258, n. 21-22.)

(p) Where the insurer participates in the defense of a case instituted against the insured and an additional insured, and wherein the insured cooperates with the insurer, then the insurer is estopped from raising non-cooperation, on the part of the additional insured, as a defense. (46 C. J. S. 258, n. 21, 22; 260, n. 32; 260, n. 34.)

(q) The test is when does the insurer have the opportunity to control the defense of the action. (46 C. J. S. 260, n. 34.)

(r) There is no presumption of bad faith on the part of an assured or additional assured, 46 C. J. S. 458, n. 48, and the presumptions are in fact against the insurer. (46 C. J. S. 459, n. 59-62; 44 C. J. S. 1180, Sec. 297, n. 70; 1186, n. 91.)

(s) Appellee submits that, within the meaning of the authorities, appellant has had substantial performance to it of all such matters. No prejudice did or could result to appellant.

Conclusion.

For the reasons hereinbefore discussed, appellee submits that the judgment, as entered, is proper and correct from the aspects of either the facts or the law. The judgment should be affirmed.

Respectfully submitted,

C. PAUL DuBois,

Attorney for Appellee.

No. 12692

United States
Court of Appeals
for the Ninth Circuit.

PALOMAS LAND AND CATTLE COMPANY,
a Corporation,

Appellant,

vs.

ARTHUR D. BALDWIN, as Surviving Trustee
Under a Certain Agreement of Trust Dated
October 29, 1943; LOUIS A. SCOTT, JOHN L.
RASBERRY and JAMES F. HULSE, Part-
ners Doing Business Under the Firm Name and
Style of Burges, Scott, Rasberry & Hulse.

Appellees.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

ROLAND RICH WOOLLEY,
DAVID MELLINKOFF,
649 S. Olive St.,
Los Angeles 14, Calif.

For Appellee Arthur D. Baldwin as Trustee, etc.:

LAWLER, FELIX & HALL,
WM. T. COFFIN,
EDWARD T. BUTLER,
800 Standard Oil Bldg.,
Los Angeles 15, Calif.

For Appellees Louis A. Scott, et al.:

OVERTON, LYMAN, PRINCE & VER-
MILLE,
CARL J. SCHUCK,
733 Roosevelt Bldg.,
Los Angeles 17, Calif.

In the District Court of the United States, Southern
District of California, Central Division

No. 11340-C

(Civil)

ARTHUR D. BALDWIN, as Surviving Trustee
Under a Certain Agreement of Trust Dated
October 29, 1943,

Plaintiff,

vs.

PALOMAS LAND AND CATTLE COMPANY,
a Corporation, and LOUIS A. SCOTT, JOHN
L. RASBERRY and JAMES F. HULSE,
Partners Doing Business Under the Firm Name
and Style of Burges, Scott, Rasberry & Hulse,

Defendants.

COMPLAINT FOR INTERPLEADER

Plaintiff complains of defendants and alleges:

I.

This is an action of interpleader brought under Section 1335 of Title 28 of the United States Code (formerly Subdivision 26 of Section 41 of Title 28 of said Code). Plaintiff resides in the County of Cuyahoga, State of Ohio, and is a citizen of said State. Defendant Palomas Land and Cattle Company (hereinafter for the sake of brevity sometimes called "defendant Palomas") is a corporation organized and existing under and by virtue of the laws of the State [2*] of California, has its principal

*Page numbering appearing at foot of page of original Certified Transcript of Record.

office in the County of Los Angeles in said State and is a citizen of said State of California. Defendants Louis A. Scott, John L. Rasberry and James F. Hulse are partners engaged in the practice of law in the City of El Paso, State of Texas, under the firm name and style of Burges, Scott, Rasberry & Hulse; said defendants (hereinafter for the sake of brevity sometimes collectively called "defendant law firm") and each of them are citizens of said State of Texas. The amount in controversy exceeds \$5,000.00 as hereinafter more fully appears.

II.

On October 29, 1943, defendant Palomas, Security-First National Bank of Los Angeles, a national banking association (hereinafter called "Security Bank"), plaintiff, James R. Garfield and Clare M. Vrooman, the latter two being now deceased, made and entered into a certain trust agreement under the terms of which defendant Palomas and Security Bank assigned, transferred and set over to plaintiff and the said James R. Garfield and Clare M. Vrooman, as Trustees, all their right, title and interest in and to a certain award of the American-Mexican Claims Commission in favor of defendant Palomas. Under the terms of said trust agreement, said Trustees were to collect, receive and receipt for all sums paid or payable on said award and to disburse the sums collected as follows:

- A 7/19ths share to defendant Palomas;
- A 7/19th share to Security Bank;
- A 5/19ths share to said Trustees.

III.

Said James R. Garfield and Clare M. Vrooman as aforesaid are now deceased and plaintiff is the successor to the interest of said James R. Garfield and Clare M. Vrooman as said Trustees and is now the sole Trustee under said trust agreement. [3]

IV.

Defendant law firm has notified plaintiff that by virtue of a letter agreement dated August 6, 1943, between it and defendant Palomas whereby the latter employed defendant law firm to render legal services, defendant law firm is entitled to receive, and it has demanded that plaintiff as said Trustee pay to it, 15% of the sums payable to defendant Palomas under the terms of said trust agreement. Defendant Palomas has notified plaintiff that defendant law firm is not entitled to 15% or any other part of the sums payable to defendant Palomas under the terms of said trust agreement and has demanded that plaintiff as said Trustee pay to defendant Palomas all of said sums, to wit: a 7/19ths share of collections made on said award.

V.

On or about March 13, 1950, plaintiff as said Trustee collected and received from the Treasurer of the United States the sum of \$99,308.70 representing a 6.2% installment upon said award of said American-Mexican Claims Commission. On March 14, 1950, plaintiff disbursed to Security Bank

the sum of \$36,587.42 as a 7/19ths share of the sum so collected and disbursed to himself as said Trustee the sum of \$26,133.86 as a 5/19ths share of the sum so collected. On the same day, plaintiff disbursed to defendant Palomas the sum of \$31,099.31 as a 7/19ths share of the sum so collected minus 15% of said share; that of the sum so collected there remains in the hands of plaintiff as said Trustee the sum of \$5,488.11, the same being 15% of a 7/19ths share of \$99,308.70 and the amount conflicting claims to which are asserted as aforesaid by defendant Palomas, on the one hand, and by defendant law firm, on the other hand. [4]

VI.

Plaintiff as said Trustee or otherwise does not now have or claim, nor has he ever had or claimed, any right, title or interest in or to that part of the amount collected by him on account of said award as remains undisbursed, to-wit: said sum of \$5,488.11, and desires to pay the same to the person or persons lawfully entitled thereto. The conflicting claims to said sum being asserted as aforesaid by defendant Palomas and defendant law firm are asserted by them in good faith and plaintiff cannot safely determine for himself which of said claims are right and lawful and cannot safely make payment of all or any part of said sum to either defendant Palomas or to defendant law firm, and, under the circumstances, is in danger of being subjected to a multiplicity of claims and actions on a single liability. In justice and equity plaintiff

should not be compelled to become involved in the disputes of said claimants and said claimants should be required to litigate and settle their conflicting claims among themselves.

VII.

This action has been brought by plaintiff without collusion as respects defendants or any of them and for the sole purpose of interpleading defendants and compelling them, without harassing or annoying plaintiff or involving plaintiff in their disputes or putting plaintiff to unnecessary costs, to litigate their conflicting claims among themselves to the end that plaintiff may, without the risk of being compelled to pay said sum of \$5,488.11 more than once or being subjected to a multiplicity of suits, perform his obligations as Trustee under said trust agreement of October 29, 1943. Contemporaneously with the commencement of this action plaintiff is paying into the registry of this Court said sum of \$5,488.11 to abide the judgment of this Court. [5]

VIII.

It was and is necessary for plaintiff to institute this action of interpleader for the purpose aforesaid and in order to avoid a multiplicity of suits and to avoid unnecessary costs, attorneys' fees and expenses of suit and to prevent irreparable damage to plaintiff. In order to institute this action, it was necessary for plaintiff to employ, and he has employed, the attorneys now appearing in his behalf to

prepare this complaint for interpleader and to file and prosecute this action and plaintiff has become and is liable to pay said attorneys reasonable compensation for their services. Liability for the compensation of said attorneys and all other expenses incident to the institution and prosecution of this action has been incurred by plaintiff in good faith and was necessarily incurred by reason of the conflicting claims asserted by defendants as aforesaid to said sum of \$5,488.11.

Wherefore, plaintiff prays:

1. That defendant Palomas Land and Cattle Company and defendants Louis A. Scott, John L. Rasberry and James F. Hulse, partners doing business under the firm name and style of Burges, Scott, Rasberry & Hulse, be required to interplead, litigate and settle between themselves their claims and rights to the money collected and undisbursed by plaintiff as said Trustee and herewith deposited into the registry of this Court as aforesaid, to wit: said sum of \$5,488.11;

2. That plaintiff be released and discharged from all further liability to defendants or any of them on account of the aforesaid collection made on March 13, 1950, by plaintiff as said Trustee from the Treasurer of the United States on account of said award; [6]

3. That the Court allow to plaintiff a reasonable sum as attorneys' fees incurred in the preparation of this complaint and in the prosecution of this action and that the sum so allowed, together with

plaintiff's costs and expenses herein, be made a lien upon said money so deposited in the registry of this Court;

4. That the Court determine the validity and priority of the respective rights and claims of defendants and direct the disposition of said deposited money which remains after payment therefrom of plaintiff's costs, expenses and attorneys' fees;

5. That a temporary restraining order and injunction be issued against defendants and each of them restraining and enjoining defendants and each of them from taking, maintaining or prosecuting any proceeding in any State or Federal Court based upon any of the claims of defendants to said money so deposited in the registry of this Court;

6. That upon the return date specified in said temporary restraining order and injunction, the same be made permanent; and

7. That plaintiff have such other and further relief as to the Court shall appear meet and proper in the premises.

LAWLER, FELIX & HALL,

/s/ WM. T. COFFIN,

/s/ EDWARD T. BUTLER,

Attorneys for Plaintiff. [7]

State of Ohio,
County of Cuyahoga—ss.

Arthur D. Baldwin, being first duly sworn deposes and says:

That he is the plaintiff in the above-entitled action and is duly authorized to make this verification as Trustee under a certain agreement of trust dated October 29, 1943; that he has read the foregoing Complaint for Interpleader and knows the contents thereof and that the same are true of his own knowledge except as to matters which are therein alleged upon information and belief, and as to those matters that he believes it to be true.

/s/ ARTHUR D. BALDWIN.

Subscribed and Sworn to before me this 28th day of March, 1950.

[Seal] /s/ FRED C. BALDWIN,
Notary Public in and for Said
County and State.

My Commission Expires July 31, 1952.

Receipt of copy acknowledged.

[Endorsed]: Filed March 30, 1950. [8]

[Title of District Court and Cause.]

TEMPORARY RESTRAINING ORDER AND
ORDER TO SHOW CAUSE

Plaintiff Arthur D. Baldwin, having filed herein his Complaint for Interpleader, and having de-

posited in the registry of this Court the sum of \$5,488.11 to abide the judgment thereof; and

It Appearing to this Court that plaintiff is a resident of the County of Cuyahoga, State of Ohio, and is a citizen of said State; that defendant Palomas Land and Cattle Company (hereinafter sometimes called “defendant Palomas”), is a corporation organized and existing under and by virtue of the laws of the State of California, having its principal office in the County of Los Angeles, State of California, and is a citizen of said State; that defendants [9] Louis A. Scott, John L. Rasberry and James F. Hulse are partners engaged in the practice of law in the City of El Paso, State of Texas, under the firm name and style of Burges, Scott, Rasberry & Hulse, and that said defendants (hereinafter sometimes collectively called “defendant law firm”), and each of them are citizens of said State;

And It Further Appearing to this Court that plaintiff is the surviving Trustee under a certain Trust Agreement by virtue of which plaintiff as said Trustee on or about the 13th day of March, 1950, collected and received from the Treasurer of the United States certain moneys on account of a certain award of the American-Mexican Claims Commission in favor of defendant Palomas; that said moneys so received and collected have been disbursed by plaintiff as said Trustee in accordance with said Trust Agreement, excepting for said sum of \$5,488.11, deposited as aforesaid by plaintiff; that defendant Palomas and defendant law firm

have asserted and now assert conflicting claims to said sum of \$5,488.11; that plaintiff as said Trustee or otherwise has no right, title or interest in said sum of \$5,488.11 except to pay said sum to the person or persons lawfully entitled thereto; that plaintiff can not safely determine for himself which of said conflicting claims are right and lawful and cannot safely make payment of all or any part of said sum of \$5,488.11 to either defendant Palomas or to defendant law firm, and that plaintiff is in danger of being subjected to a multiplicity of claims and actions on a single liability;

Now, Therefore, It Is Hereby Ordered Adjudged and Decreed as follows:

1. That defendant Palomas Land and Cattle Company and defendants Louis A. Scott, John L. Rasberry, and James F. Hulse, [10] partners doing business under the firm name and style of Burges, Scott, Rasberry & Hulse, and each of their agents, attorneys, servants and representatives be and they hereby are and each of them hereby is enjoined and restrained until the further order of this Court from taking, maintaining or prosecuting any proceeding in any State or Federal Court based upon any of the claims of defendants to the said sum of \$5,488.11 deposited by plaintiff in the registry of this Court;

2. That defendant Palomas Land and Cattle Company and defendants Louis A. Scott, John L. Rasberry, and James F. Hulse, partners doing business under the firm name and style of Burges, Scott,

Rasberry & Hulse, are and each of them is hereby required to appear in this Court at Court Room No. 3 of this Court in the Federal Building, Temple and Main Streets, in the City of Los Angeles, County of Los Angeles, State of California, on the 8th day of May, 1950, at the hour of 10 o'clock a.m. of said day, then and there to show cause if any they have:

a. Why the Order set forth in paragraph 1 above should not be made permanent;

b. Why said defendants should not be required to interplead, litigate and settle between themselves their claims and rights to said sum of \$5,488.11;

c. Why plaintiff should not be released and discharged from all further liability to defendants or any of them on account of the aforesaid moneys collected by plaintiff as said Trustee as aforesaid on or about the 13th day of March, 1950;

d. Why plaintiff should not be allowed a reasonable sum as attorneys' fees incurred in the preparation of his complaint herein and in the prosecution of this action, and that the sum so allowed, together with plaintiff's costs and expenses herein, be [11] made a lien upon said money so deposited in the registry of this Court;

e. Why this Court should not determine the validity and priority of the respective rights and claims of defendants, and direct the disposition of said deposited money which remains after payment

therefrom of plaintiff's costs, expenses and attorneys' fees;

3. That a copy of this Temporary Restraining Order and Order to Show Cause, together with a copy of the Complaint herein, be served upon the defendant Palomas Land and Cattle Company, and the defendants Louis A. Scott, John L. Rasberry and James F. Hulse, partners doing business under the firm name and style of Burges, Scott, Rasberry & Hulse, by the United States Marshals of the districts wherein said defendants respectively reside or may be found.

Dated this 30th day of March, 1950.

/s/ JAMES M. CARTER,
District Judge.

[Endorsed]: Filed March 30, 1950. [12]

[Title of District Court and Cause.]

NOTICE OF MOTION TO DISMISS

To the Plaintiff Above Named and Lawler, Felix & Hall, Wm. T. Coffin and Edward T. Butler, Esqs., His Attorneys, and to the Defendants Louis A. Scott, John L. Rasberry and James F. Hulse, Partners Doing Business Under the Firm Name and Style of Burges, Scott, Rasberry & Hulse, and to Overton, Lyman, Prince, and Vermille and Carl J. Schuck, Esqs., Their Attorneys:

You and Each of You Will Please Take Notice that at the hour of 10:00 a.m. on the 15th day of May, 1950, in Court Room No. 3 of the above-entitled Court at the Federal Building, Temple and Main Streets, in the City and County of Los Angeles, State of California, or as soon thereafter as counsel can be heard, the defendant Palomas Land and Cattle Company, a Corporation, will move the above-entitled Court to dismiss the within action because the complaint fails to state a claim against this defendants upon which relief can be granted.

Said motion will be made upon all the records and files [19] in the above-entitled action, the foregoing Notice of Motion and the Memorandum of Points and Authorities accompanying this Notice.

Dated this 4th day of May, 1950.

ROLAND RICH WOOLLEY and
DAVID MELLINKOFF,

By /s/ DAVID MELLINKOFF,
Attorneys for Defendant Palomas Land and Cattle
Company.

[Endorsed]: Filed May 4, 1950. [20]

[Title of District Court and Cause.]

AFFIDAVIT OF ROLAND RICH WOOLLEY
IN OPPOSITION TO ORDER TO SHOW
CAUSE

State of California,
County of Los Angeles—ss.

Roland Rich Woolley, being first duly sworn, deposes and says that he is one of the attorneys for the defendant Palomas Land and Cattle Company, a California Corporation;

That he has heretofore requested the plaintiff Trustee to send to him any documents or other writings evidencing the asserted claims of the other defendants in the above-entitled action, upon which the refusal of said plaintiff Trustee to pay Palomas Land and Cattle Company the monies to which it is entitled in accordance with the provisions of the Trust Agreement mentioned in the complaint on file herein is based;

That pursuant to such request, the only document or other writing furnished to affiant is an alleged letter agreement dated August 6, 1943, a true copy of which is attached hereto.

/s/ ROLAND RICH WOOLLEY.

Subscribed and sworn to before me this 5th day of May, 1950.

[Seal] /s/ WILLIAM J. CLAYTON,
Notary Public in and for
Said County and State.

My Commission expires April 12, 1954. [25]

“August 6, 1943.

Burges, Burges, Scott, Rasberry & Hulse,
El Paso, Texas.

Confirming our verbal agreement, the undersigned hereby employs you to prosecute and assert the claims of undersigned to any award made to undersigned under the provisions of the convention between the United States of America and Mexico, dated November 19, 1941, and Public Law 814 adopted by the 77th Congress of the United States, and to defend any claims asserted to any such award by Ben Williams, et al., and the Security-First National Bank of Los Angeles. Undersigned agrees to pay you for any services rendered in this connection as follows:

1. Should the matters in controversy be settled by agreement prior to the filing of any suit by undersigned or the parties named, you shall receive 5% of any sums realized by undersigned or either of them.

2. Should the matters in controversy be disposed of by litigation or settled by agreement after the filing of any suit or legal procedure by undersigned or the other claimants mentioned, you shall receive 15% of all sums realized by undersigned or either of them.

3. It is understood that in arriving at your fee, any sum deducted from the award by the law firm of Garfield, Baldwin & Vrooman or ultimately allowed them for the prosecution of such claims before the Mexican Claims Commission shall not be

taken into consideration in arriving at the sums realized by undersigned.

4. It is also understood that undersigned shall pay all expenses incurred by you in the handling of this matter, including traveling expenses, telephone and telegraph bills, etc., and the fees of any out of state attorney or attorneys whom you may deem it necessary to employ for the purpose of prosecuting or defending any litigation instituted outside the State of Texas to protect the undersigned. [26]

Yours very truly,

PALOMAS LAND AND CAT-
TLE COMPANY,

By /s/ MARSHALL B. STEPHENSON,
President.

HUECO CATTLE COMPANY,

By /s/ MARSHALL B. STEPHENSON,
President.

Approved:

BURGES, BURGES, SCOTT,
RASBERRY & HULSE,

By /s/ J. L. RASBERRY.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 8, 1950.

[Title of District Court and Cause.]

AFFIDAVIT OF LETHA L. METCALF IN OP-
POSITION TO ORDER TO SHOW CAUSE

State of California,
County of Los Angeles—ss.

Letha L. Metcalf, being first duly sworn, deposes and says that she is the President of the Palomas Land and Cattle Company, a California Corporation, which corporation is named as the defendant in the above-entitled action, that attached hereto and made a part hereof, is a true copy of the Trust Agreement dated October 29, 1943, mentioned in plaintiff's complaint on file herein;

Affiant hereby makes reference to Paragraph I of said Trust Agreement and particularly to the portion thereof reading as follows:

“The Trustees shall execute this Trust without charge. No expenses shall be incurred without first obtaining the written approval of Palomas and Bank”;

That in connection with the foregoing, affiant states [28] the Palomas Land and Cattle Company never gave any consent and never gave any approval, written or otherwise to the filing, prosecution or maintenance of the within action by the above-entitled plaintiff or any one else; and affiant further states that Palomas Land and Cattle Company does not now consent to nor approve of said action, that said action is unnecessary, unauthorized and a breach of the aforesaid Trust Agreement;

That said plaintiff Trustee is indebted to Palomas Land and Cattle Company in the sum of Five Thousand Four Hundred Eighty-eight Dollars and Eleven Cents (\$5,488.11), plus legal interest thereon from on or about the 13th day of March, 1950, and that in addition thereto plaintiff Trustee is indebted to Palomas Land and Cattle Company for a sum in excess of Twenty-five Thousand Dollars (\$25,000.00) on account of monies of said Trust similarly wrongfully withheld from Palomas Land and Cattle Company, and paid out by said Trustee without the consent of Palomas Land and Cattle Company, and in violation of the terms of said Trust. That unless sooner removed as Trustee, said Trustee will become further indebted to Palomas Land and Cattle Company on account of future installments on the award of the American-Mexican Claims Commission, mentioned in said complaint. That Palomas Land and Cattle Company has claims against the other defendants arising out of and in connection with the alleged Agreement of August 6, 1943, over and above the claim mentioned in the complaint; that if Palomas Land and Cattle Company is forced to litigate piecemeal with the other defendants and without the presence of the plaintiff, Palomas Land and Cattle Company will be driven to a multiplicity of actions at great cost and expense.

That defendant Palomas Land and Cattle Company has never assigned to, transferred to or given a lien to these other defendants upon the whole or any part of the monies payable to defendant Palo-

mas Land and Cattle Company pursuant to said Trust Agreement.

/s/ LETHA L. METCALF.

Subscribed and sworn to before me, this 4th day of May, 1950.

[Seal] /s/ WILLIAM J. CLAYTON,
Notary Public in and for
Said County and State.

My Commission expires April 12, 1954. [31]

This Agreement made as of the 29th day of October, 1943, by and between Palomas Land and Cattle Company, a California corporation, as Party of the First Part, hereinafter called "Palomas," Security-First National Bank of Los Angeles, a National Banking Association, as Party of the Second Part, hereinafter called "Bank," and James R. Garfield, Arthur D. Baldwin and Clare M. Vrooman, of Cleveland, Ohio, individually and as partners engaged in the practice of law under the firm name of Garfield, Baldwin & Vrooman, collectively as Party of the Third Part, hereinafter for convenience sometimes referred to as "Trustees,"

Witnesseth, That Whereas:

1. Under date of August 26, 1943, pursuant to the provisions of the Settlement of Mexican Claims Act of 1942, the American Mexican Claims Commission entered an award in favor of Palomas in the amount of \$1,686,056, and certified such award to the Secretary of the Treasury for payment to

Palomas in accordance with the provisions of said Act of 1942, said award having been made on that certain claim of Palomas theretofore pending before the General Claims Commission of the United States of America and United Mexican States under Docket No. 2067 of that Commission;

2. The parties to this agreement assert conflicting claims to said award; the conflicting claims of Palomas and Bank are now the subject of that certain action in the District Court of the United States for the District of Columbia, entitled: "Security-First National Bank of Los Angeles, etc., Plaintiff, vs. Palomas Land and Cattle Company, etc., et al., Defendants," designated as Civil Action No. 21295 on the records of said Court;

3. The parties hereto are desirous of resolving their conflicting claims to said award and of compromising and settling all differences among them in the manner hereinafter set forth;

Now, Therefore, in consideration of the premises and the respective undertakings on the part of the parties hereto, as hereinafter set forth, it is hereby agreed as follows:

I.

Palomas and Bank shall, and do hereby, assign, transfer and set over unto the Trustees all of their respective rights, titles and interests in and to said award (including all sums paid or payable on said award), in trust nevertheless, and the Trustees shall, and hereby covenant and agree to, hold the same, together with all their rights, titles and in-

terests in and to said award (including all sums paid or payable on said award), in trust for the following purposes:

(a) To collect, receive and receipt for all sums paid or payable on said award and the Trustees shall have full power so to do;

(b) To promptly, upon receipt of any sums paid or payable on account of said award, disburse the same as follows:

A seven-nineteenths (7/19ths) part to Palomas;

A seven-nineteenths (7/19ths) part to Bank;

The remaining five-nineteenths (5/19ths) part to Garfield, Baldwin & Vrooman (the Trustees). [32]

Pending actual disbursement of said funds by the Trustees, as above provided, the Trustee shall maintain the same in a trust account with the Cleveland Trust Company of Cleveland, Ohio, or with some other responsible bank or trust company. The Trustees shall execute this trust without charge. No expenses shall be incurred without first obtaining the written approval of Palomas and Bank. The Trustees shall not make or permit any substitution under any power of attorney heretofore or hereafter given them to enable them to effect collection of sums payable on said award without first causing the substitute to execute an undertaking to hold all funds coming to his hands in trust for the purposes and on the terms and conditions herein set forth.

II.

Each party to this agreement shall, and does hereby, release and forever discharge each other party to this agreement, and Bank, in addition, shall and does hereby release and forever discharge Hueco Cattle Company, a Texas corporation, and Marshall B. Stephenson and each of them of and from all claims, demands, actions and causes of action of whatsoever character, now existing or hereafter arising and based upon any contract, agreement, instrument, transaction, matter, happening or thing of whatsoever nature to the date hereof, except claims, demands, actions or causes of action based upon this agreement.

III.

Each party hereto on the demand of any other party hereto shall execute and deliver such further instrument or instruments as may be necessary or convenient to enable the Trustees to collect any sums paid or payable on account of said award and to disburse the same as hereinabove set forth, or to otherwise effectuate the purposes of this agreement.

IV.

In the event that all sums paid or payable on the aforesaid award shall not have been sooner collected and disbursed by the Trustees, as provided in Paragraph I hereof, the trust created in and by said Paragraph I shall terminate on the 28th day of October, 1964, and thereupon any funds in the hands of the Trustees collected on said award shall be

forthwith disbursed in accordance with the provisions of Paragraph I hereof, and said award (to the extent of and including any sums unpaid on account thereof) shall be disposed of by the Trustees in such manner as the parties hereto may agree upon in writing, and failing such agreement, then the Trustees shall distribute said award (to the extent of and including any sums unpaid on account thereof), discharged of any trust, as follows:

An undivided seven-nineteenths ($7/19$ ths) part to Palomas;

An undivided seven-nineteenths ($7/19$ ths) part to Bank;

The remaining undivided five-nineteenths ($5/19$ ths) part to Garfield, Baldwin & Vrooman (the Trustees).

V.

Palomas, within thirty (30) days from the date hereof, shall cause to be executed, and shall deliver to Bank, a good and sufficient instrument or instruments wherein and whereby Palomas [33] and its President, Marshall B. Stephenson, and each of them, release and forever discharge Compania Palomas de Terrenos y Ganado, S. A., a Mexican corporation, hereinafter called "Compania Palomas," Nacional Ganadera, S. A., de C. V., a Mexican corporation, hereinafter called "Nacional Ganadera," Ben F. Williams, A. J. Kalin, W. C. Greene, F. A. Villalobos, Charles E. Wiswall and Alfonso Morales, and each of them, of and from all claims, demands, actions and causes of actions of whatsoever

character, now existing or hereafter arising and based upon any contract, agreement, instrument, transaction, matter, happening or thing of whatsoever nature to the date hereof.

VI.

Bank, within thirty (30) days from the date hereof, shall cause to be executed, and shall deliver to Palomas, a good and sufficient instrument or instruments wherein and whereby Compania Palomas, Nacional Ganadera, said Ben F. Williams, A. J. Kalin, W. C. Greene, F. A. Villalobos, Charles E. Wiswall and Alfonso Morales, and each of them, release and forever discharge Palomas, said Marshall B. Stephenson and Hueco Cattle Company, a Texas corporation, and each of them, of and from all claims, demands, actions and causes of action of whatsoever character, now existing or hereafter arising and based upon any contract, agreement, instrument, transaction, matter, happening or thing of whatsoever nature to the date hereof.

VII.

Any notice which any party may desire to give to any other party may be given by United States registered mail addressed to Palomas at 1100 First National Bank Building, El Paso, Texas, to Bank at its Head Office, Sixth and Spring Streets, Los Angeles, California, and to the Trustees at 1401 Midland Building, Cleveland, Ohio, subject to the right of any party to designate for itself a different address by notice similarly given.

In Witness Whereof, the parties hereto have ex-

executed this agreement as of the day and year first above written.

PALOMAS LAND AND
CATTLE COMPANY,

[Corporate Seal]

By /s/ MARSHALL B. STEPHENSON,
President.

By /s/ SADIE BROWN,
Secretary.

Party of the First Part
and "Palomas."

SECURITY-FIRST NATIONAL
BANK OF LOS ANGELES,

[Corporate Seal]

By /s/ ROBT. J. SEVITZ,
Vice President.

By /s/ RANDALL BOYD,
Asst. Sec.

Party of the Second Part
and "Bank."

/s/ JAMES R. GARFIELD,

/s/ ARTHUR D. BALDWIN,

/s/ CLARE M. VROOMAN.

GARFIELD, BALDWIN &
VROOMAN,

By s/ JAMES R. GARFIELD,

Collectively Party of the
Third Part and "Trustees."

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 8, 1950. [34]

[Title of District Court and Cause.]

ANSWER OF DEFENDANTS LOUIS A.
SCOTT, JOHN L. RASBERRY AND JAMES
F. HULSE TO COMPLAINT FOR INTER-
PLEADER

Come now defendants Louis A. Scott, John L. Rasberry and James F. Hulse and for answer on behalf of themselves alone to the complaint in interpleader herein, allege:

1. Deny the allegation in paragraph VI of the complaint that the, or any, claim asserted by defendant Palomas against plaintiff to the said sum of \$5,488.11 deposited by plaintiff into the registry of this Court, ever was or is asserted by said defendant Palomas in good faith. Allege that only these answering defendants are entitled to the said sum (less such reasonable amount as may be allowed by this Court to plaintiff for his attorney's fees, costs and expenses herein), and allege that defendant Palomas [38] is not entitled to said sum, or to any part thereof.

2. Except as above denied or otherwise specifically alleged, these answering defendants admit each and every allegation contained in the complaint herein, and consent that an order be made herein requiring all defendants to interplead, litigate and settle between themselves their claims and rights to the said sum deposited into the registry of this Court; and further consent that plaintiff be released and discharged from all further liability with respect to, but only to the extent of, the said

sum of \$5,488.11 deposited into the registry of this Court; and further consent that this Court allow to plaintiff a reasonable sum as attorney's fees, costs and expenses, and that the same be ordered to be a lien upon said sum so deposited into the registry of this Court; and further consent that the Temporary Restraining Order herein, enjoining and restraining defendants until further order of this Court from taking, maintaining or prosecuting any proceedings in any State or Federal Court, based on any of the claims of defendants to the said sum, be made permanent.

Wherefore these answering defendants pray as follows:

(a) That all defendants be ordered to interplead, litigate, and settle their claims and rights to the said sum of \$5,488.11 deposited into the registry of this Court;

(b) That plaintiff be released and discharged from all further liability to defendants with respect to, but only to the extent of, \$5,488.11 deposited into the registry of this Court;

(c) For such other and further relief as to the Court may seem proper.

OVERTON, LYMAN, PRINCE
& VERMILLE and
CARL J. SCHUCK,

By /s/ CARL J. SCHUCK,
Attorneys for Defendants Louis A. Scott, John L.
Rasberry and James F. Hulse.

Duly verified.

[Endorsed]: Filed May 18, 1950. [39]

[Title of District Court and Cause.]

AFFIDAVIT OF JOHN L. RASBERRY IN OP-
POSITION TO AFFIDAVITS OF ROLAND
RICH WOOLLEY AND LETHA A. MET-
CALF, FILED HEREIN IN OPPOSITION
TO ORDER TO SHOW CAUSE

State of Texas,
County of El Paso—ss.

John L. Rasberry, being first duly sworn, deposes and says: That he is an attorney-at-law and is a member of the firm of Burges, Scott, Rasberry & Hulse, being a partnership composed of the defendants Louis A. Scott, John L. Rasberry and James F. Hulse. Said law firm and affiant are engaged in the practice of law in the City of El Paso, State of Texas. Said law firm of Burges, Scott, Rasberry & Hulse is a successor law firm to the former firm of the same name composed of defendants Louis A. Scott, John L. Rasberry and James F. Hulse, and also of William H. Burges. Said William H. Burges died May 11, 1946, at which time said present firm came into existence as a successor of said former firm. Said former firm of Burges, Scott, Rasberry & Hulse, composed of the [50] individuals above named, itself was a successor law firm to the law firm known as Burges, Burges, Scott, Rasberry & Hulse, which was composed of said defendants Louis A. Scott, J. L. Rasberry and James F. Hulse and also of the said William H. Burges and Richard F. Burges. Rich-

ard F. Burges died January 13, 1945, as a result of which said firm ceased to exist and as of which time said former firm of Burges, Scott, Raspberry & Hulse came into existence as a successor of said first firm.

The award of the American-Mexican Claims Commission, referred to in the complaint herein, was made on or about August 23, 1943, under a claim which prior thereto had been filed and prosecuted by defendant Palomas Land and Cattle Company (hereinafter for convenience usually referred to simply as defendant Palomas) and was allowed in the total sum of \$1,686,056.00. Prior to the allowance of said claim certain persons known as Ben Williams, Charles E. Wiswall, W. C. Greene, A. J. Kalin, and Alphonso Morales, and the Security-First National Bank of Los Angeles, a national banking association, did assert that they only, and not defendant Palomas were entitled to and were the owners of the said claim filed and then being prosecuted by defendant Palomas against the said American-Mexican Claims Commission, and asserted and claimed that only they were entitled to any award made pursuant to said claim.

For some time prior to June, 1943, and until his death on May 11, 1946, one Marshall B. Stephenson was the president of defendant Palomas and was its manager and sole owner of all of its stock. He was also the husband of Letha L. Stephenson, now Letha L. Metcalf, who since his death has been and is the president of defendant Palomas. Said Letha L. Metcalf is the same person as affiant by that

name who executed the affidavit sworn to May 4, 1950, and on file herein.

In June, 1943, said Marshall B. Stephenson had a conversation with affiant, who then was a member of said firm of Messrs. [51] Burges, Burges, Scott, Rasberry & Hulse. Said conversation took place in El Paso, Texas. Mr. Stephenson and affiant discussed the said then pending claim of defendant Palomas against the said American-Mexican Claims Commission and said Marshall B. Stephenson asked affiant whether he and the said law firm of which he was a member would prosecute and assert the claim of defendant Palomas to any award made by that claims commission and defend the position of Palomas against the aforesaid claims then being made by Ben Williams, et al. and the Security-First National Bank of Los Angeles. Affiant stated that he and said law firm would do so. There was then a discussion as to what the compensation of affiant and his then firm should be for services to be rendered in that connection, and thereafter said Marshall B. Stephenson stated that for such services said law firm would receive 15% of all sums realized by defendant Palomas in the event the matters in controversy were disposed of by litigation or were settled after the filing of any lawsuit. Affiant then stated to said Marshall B. Stephenson that the said fee arrangement was acceptable to him and said law firm.

Thereafter affiant and his said firm did various things for and on behalf of defendant Palomas in representing its interests and defending against the

said claims of Ben Williams, et al. and the Security-First National Bank of Los Angeles.

On or about August 6, 1943, said Marshall B. Stephenson, as President of defendant Palomas, delivered to affiant and his said law firm a letter dated August 6, 1943, a copy of which is attached hereto as Exhibit "A." (A copy of said agreement is also attached as an exhibit to the affidavit of Roland Rich Woolley on file herein.) Affiant signed his name "J. L. Rasberry" at the place indicated at the end of that letter and the signature of "Marshall B. Stephenson" appeared at the place indicated in said exhibit. At that time said Marshall B. Stephenson was the President of defendant Palomas, was the sole owner of all of its shares of stock, was the Manager of said defendant and did act for and on behalf of said defendant. Under said agreement it was provided, among other things, as follows:

"Should the matters in controversy be disposed of by litigation or settled by agreement after the filing of any suit or legal procedure by undersigned or the other claimants mentioned, you shall receive 15% of all sums realized by undersigned or either of them."

As above stated, on August 23, 1943, an award was entered by the American-Mexican Claims Commission under the claim of defendant Palomas and the award was in the total sum of \$1,686,056.00.

On September 18, 1943, a suit was filed in the District Court of the United States for the District of Columbia, entitled "Security-First National

Bank of Los Angeles vs. Palomas Land and Cattle Company," No. 21295, and on September 22, 1943, a suit was filed in the Superior Court of the State of California, in and for the County of Los Angeles, entitled "Security-First National Bank of Los Angeles vs. Palomas Land and Cattle Company," No. 488283. Said suits were filed by said Security-First National Bank of Los Angeles in support of the aforesaid claims and contested the right of defendant Palomas to the said award by the said American-Mexican Claims Commission and prayed, among other things, that said plaintiff be adjudged entitled to receive and have said award.

Said law firm of Burges, Burges, Scott, Rasberry & Hulse and especially affiant John L. Rasberry represented said defendant Palomas in defending against the said actions and in protecting the right of said defendant Palomas to the said award, including representation of said defendant and negotiation on behalf of it in connection with the settlement referred to in the next paragraph hereof.

On or about October 29, 1943, said conflicting claims to the said award, were settled under the terms of the trust Agreement dated October 29, 1943, between defendant Palomas and the said [53] Security-First National Bank of Los Angeles and James M. Garfield, Arthur D. Baldwin (plaintiff herein) and Clare M. Vrooman, a true copy of which agreement is attached hereto as Exhibit "B." (A copy of said agreement is also attached to the affidavit of said Letha L. Metcalf on file herein.)

Under the terms of the said settlement and trust Agreement there was payable to defendant Palomas as its share of the said award, 7/19 of the said total award of \$1,686,056.00, or a total sum payable to defendant Palomas of \$590,119.60, said sum being payable when and as collected by plaintiff Baldwin and his predecessor trustees under said trust Agreement. Under and by virtue of said agreements between defendant Palomas and the said law firm of Burges, Burges, Scott, Rasberry & Hulse, referred to above, said law firm thereupon became entitled to receive 15% of said 7/19 share payable to said defendant Palomas or a total sum of \$88,517.94, and 15% of the said 7/19 share of defendant Palomas was thereby assigned in equity to said law firm as security for its said fee for legal services rendered to defendant Palomas.

On December 21, 1943, defendant Palomas and said law firm received from plaintiff herein a check in the sum of \$177,035.88, being the 7/19 share payable to defendant Palomas under said trust Agreement in and to a 30% installment paid on said award, and on said date said law firm by affiant John L. Rasberry and defendant Palomas by said Marshall B. Stephenson, signed and delivered a letter to the El Paso National Bank of El Paso, Texas, transmitting said check to said bank and directing the said bank to effect collection of said check and to deposit 15% of the proceeds thereof, to wit, \$26,555.38, to said law firm and to deposit the balance of said proceeds, to wit, \$150,480.50, to the account of defendant Palomas. A true copy of

said letter dated December 21, 1943, is attached hereto as Exhibit "C." On said date said Marshall B. Stephenson and affiant caused the proceeds of said check to be deposited with said El Paso National Bank, \$26,555.38 to the account [54] of the said law firm of Burges, Burges, Scott, Rasberry & Hulse and the balance thereof, to wit, \$150,480.50, to the account of defendant Palomas, and said proceeds were so deposited in said amounts to said accounts.

On or about March 13, 1944, defendant Palomas duly and regularly executed and filed with the United States Treasury Department an amended return for its 1941 Corporation Income and Declared Value Excess-Profits Tax Return. Said amended return was signed on behalf of defendant Palomas by said Marshall B. Stephenson as its President and by said Letha L. Stephenson. Incorporated in said Amended Return and attached thereto as a part thereof was a schedule entitled "Palomas Land & Cattle Co. Statement of Claim Recoverable and Recovered," a true copy of which is attached hereto as Exhibit "D." In said schedule defendant Palomas reported, among other things, the said interest of said law firm in the said 7/19 share of defendant Palomas in said award, and reported the said payment of \$26,555.38 to said law firm, as follows:

"Payment made or to be made to Burges, Burges, Scott, Rasberry & Hulse upon receipt by Palomas Land and Cattle Company of cash upon account of the award, being a contingent

interest assigned to them for legal services at the time the conflicting claims of the Security-First National Bank of Los Angeles was asserted—cash paid in 1943, \$26,555.38; total claim \$88,517.94.” (Underscoring supplied.)

Also incorporated in said Amended Return, and as a part thereof, was an affidavit of which the following is a true copy:

“We, the undersigned, President (or Vice President, or other principal officer) and Treasurer (or Assistant Treasurer, or Chief Accounting Officer) of the Corporation for which this return is made, being severally duly sworn, each for himself deposes and says that this return (including any accompanying schedules and statements) has been [55] examined by him and is, to the best of his knowledge and belief, a true, correct, and complete return, made in good faith, for the taxable year stated, pursuant to the Internal Revenue Code and the regulations issued thereunder.

MARSHALL B. STEPHENSON,
(President or other
Principal Officer.)

LETHA L. STEPHENSON,
(Treasurer, Assistant Treasurer, or Chief Accounting Officer.)”

Said affidavit was signed under oath before a notary public on or about March 13, 1944, by said Marshall

B. Stephenson and said Letha L. Stephenson, both of whom then were officers of defendant Palomas. Said Marshall B. Stephenson was the president and sole owner of all of the stock of said defendant Palomas and was its manager.

On or about March 13, 1944, defendant Palomas duly executed and filed with the United States Treasury Department its Annual Information Return on Form 1096, and therein stated that in 1943 it had paid to the said law firm of Burges, Burges, Scott, Rasberry & Hulse a fee of \$26,555.38, and attached thereto a schedule entitled "Palomas Land and Cattle Company—Statement Relative to Fees Paid in 1943," a true copy of which is attached hereto as Exhibit "E." (Under date of January 31, 1950, affiant mailed a true copy of said Exhibit "E" to Roland Rich Woolley, one of the attorneys for defendant Palomas herein.) In said schedule defendant Palomas stated, among other things, as follows:

"The amount paid Burges, Burges, Scott, Rasberry & Hulse as shown on Form 1099 was by virtue of a contingent interest assigned to them for legal services at the time the conflicting claims of the Security-First National Bank of Los Angeles were asserted." (Underscoring supplied.)

Said amount reported on said Form 1099 (which was attached to said Form 1096), as the fee paid said law firm by defendant Palomas [56] was \$26,555.38. Incorporated in and as a part of said An-

nual Information Return was an affidavit of which the following is a true copy:

“I swear (or affirm) that to the best of my knowledge and belief the accompanying reports on Form 1099 and Form 1099 L and/or the statements on the reverse side of this form, including any accompanying schedules, constitute a true and complete return of payments of the above-described classes of income made by the person or organization named above during the calendar year 1943.”

Said affidavit was signed “Marshall B. Stephenson, President,” and was subscribed and sworn to before a Notary Public.

Thereafter on or about October 27, 1945, affiant as attorney for defendant Palomas, received from said James R. Garfield (a predecessor trustee of plaintiff), a second installment check based on 10% of the said 7/19 share of Palomas under the award, that check being in the total sum of \$59,011.96. On October 30, 1945, affiant and said Marshall B. Stephenson both personally delivered said check to the El Paso National Bank and caused 15% thereof, to wit, \$8,851.79, to be deposited to the account of said law firm of Burges, Scott, Rasberry & Hulse, and the balance thereof, to wit, \$50,160.17, to be deposited to the account of defendant Palomas and said sums were so deposited to those accounts.

On May 11, 1946, said Marshall B. Stephenson, who was then still the President and sole owner of all of the stock of defendant Palomas, died, and all

of that stock thereupon became the property of said Letha L. Stephenson (now Letha L. Metcalf) for life. At all times thereafter herein referred to, said Letha L. Metcalf was the President and sole owner for life of all of the stock of defendant Palomas.

On or about May 31, 1947, affiant received from said James R. Garfield a United States Treasury Department voucher for the [57] third installment on the award equal to 6.5% of the total award. Said voucher required signature by two officers of defendant Palomas. At that time Mr. P. W. Pogson was the Vice President of defendant Palomas and Percy W. Pogson, Jr., was the Secretary-Treasurer of defendant Palomas. Both resided in El Paso, Texas. Said officers executed said voucher on behalf of defendant Palomas and affiant then sent said voucher so executed by mail to said James R. Garfield and accompanied said voucher with a letter dated May 31, 1947, to said James R. Garfield, a true copy of which is attached hereto as Exhibit "F." Under date of May 31, 1947, affiant also mailed a letter to said Letha L. Stephenson in which he explained the calculation of said third installment, mentioned the deduction of "our attorney's fees of 15%" and enclosed a true copy of his said letter of May 31, 1947, to said James R. Garfield (Exhibit "F"). A true copy of affiant's said letter of May 31, 1947, to said Letha L. Stephenson is attached hereto as Exhibit "G." (On January 31, 1950, affiant mailed a true copy of said Exhibit "G" to said Roland Rich Woolley, attorney herein for defendant Palomas.)

Thereafter affiant received a letter from plaintiff dated July 1, 1947, enclosing two checks dated July 1, 1947, on said third installment, one payable only to defendant Palomas in the amount of \$32,604.11, being 85% of the third installment payable to defendant, Palomas, and the other payable to defendant Palomas and Messrs. Burges, Scott, Rasberry & Hulse in the amount of \$5,753.66, being in the sum of 15% of said third installment. A true copy of said letter of July 1, 1947, is attached hereto as Exhibit "H." Affiant then by letter dated July 8, 1947, addressed to P. W. Pogson, Jr. (a true copy of which is attached as Exhibit "I" hereto), mailed to the latter a copy of said letter dated July 1, 1947 (Exhibit "H"), and the said two checks. On the same day, affiant mailed to said Letha L. Stephenson a copy of said Exhibits "H" and "I." Said check in the sum of \$5,753.66 was then endorsed by affiant on behalf [58] of said law firm and by said P. W. Pogson as Vice-President and Percy W. Pogson, Jr., as Secretary-Treasurer of defendant Palomas, and was then by affiant deposited to the account of said law firm.

On January 24, 1948, affiant received from said James R. Garfield a voucher for the fourth installment equal to 6% of the award. Said voucher was executed on behalf of defendant Palomas by P. W. Pogson and Percy W. Pogson, Jr., as, and who then were, respectively, the Vice President and Secretary-Treasurer of defendant Palomas. On said date affiant mailed said voucher to said James R. Garfield enclosed in his letter dated January 24,

1948, a true copy of which is attached hereto as Exhibit "J." Affiant also sent a true copy of said letter to said Letha L. Stephenson, to said P. W. Pogson, Jr., and to Mr. Henry T. Moore, who at that time was the Los Angeles attorney of said defendant Palomas.

Thereafter under date of March 4, 1948, plaintiff received from said James R. Garfield two checks dated March 4, 1948, for the fourth installment payable under said award equal to 6% thereof, the first check being payable only to defendant Palomas in the amount of \$30,096.09, being equivalent to 85% of said fourth installment payment, and the second check being payable to said defendant Palomas and to said law firm, being in the amount of \$5,311.08, being in the amount of 15% of said fourth installment payment. A true copy of said letter dated March 4, 1948, is attached hereto as Exhibit "K." Said check in the amount of \$5,311.48 was thereafter endorsed by affiant for said law firm of Burges, Scott, Rasberry & Hulse, and was also endorsed on behalf of defendant Palomas by P. W. Pogson and Percy W. Pogson, Jr., as Vice President and Secretary-Treasurer, respectively, of defendant Palomas. Affiant then deposited the said check to the account of said law firm.

On December 27, 1948, affiant received a voucher for the fifth installment equivalent to 6.4% of said award, said voucher [59] being received by letter from said James R. Garfield. On said date said voucher was signed on behalf of defendant Palomas

by P. W. Pogson and Percy W. Pogson, Jr., as, and who then were, the Vice President and Secretary-Treasurer, respectively, of defendant Palomas, and affiant on said date transmitted said voucher so executed to said James R. Garfield by letter dated December 27, 1948, a true copy of which is attached hereto as Exhibit "L." On said date affiant also mailed a true copy of said letter of December 27, 1948, to Letha L. Stevenson, then President of defendant Palomas, and to P. W. Pogson, Jr., who was then the Secretary-Treasurer of defendant Palomas, and to said Henry T. Moore, who was then the Los Angeles attorney for defendant Palomas.

Thereafter on or about February 6, 1949, affiant received from said James R. Garfield two checks covering the fifth installment on said award, one of which was payable to the order of defendant Palomas and was in the amount of \$32,102.51, which sum was 85% of said payment payable to defendant Palomas, and the other check was payable to the order of defendant Palomas and to said law firm of Burges, Scott, Rasberry & Hulse and was in the amount of \$5,665.14, which was equivalent to 15% of said fifth installment. A true copy of said letter dated February 4, 1949, is attached hereto as Exhibit "M." Thereafter said latter check was endorsed by affiant for said law firm and was endorsed also by P. W. Pogson and Percy W. Pogson, Jr., on behalf of defendant Palomas, said persons still being then the Vice President and Secretary-Treasurer, respectively, of defendant Palomas. There-

after affiant caused said check to be deposited to the account of said law firm.

At no time until on or about January 19, 1950, did defendant Palomas or any officer or director of said defendant Palomas ever question the right of defendant law firm to receive 15% of all amounts payable to defendant Palomas under said award, or question the fact that 15% of said recovery had been assigned to said law firm, or that said law firm had a lien on said recovery to the extent of said 15% interest, or question the right of affiant's said law firm to receive said sum directly from the trustees. Until January 19, 1950, said law firm and affiant received no comments of any kind from Letha L. Stephenson (now Letha L. Metcalf) with respect to any of the matters stated in, or directions given in, said letters from affiant to said James R. Garfield, copies of which are attached hereto as Exhibits "F," "J" and "L."

The aforesaid letter agreement of August 6, 1943, (Exhibit "A" hereto), was executed, signed and delivered by said Marshall B. Stephenson and by affiant in El Paso, Texas.

Affiant respectfully submits that by virtue of the facts herein and in the Complaint stated, and particularly by the said [61] agreement of August 6, 1943, (Exhibit "A" hereto), and by the conduct of the parties and especially of defendant Palomas, 15% of the Palomas share under the trust Agreement (Exhibit "B" hereto) was assigned in equity to defendant law firm and that said law firm has a

valid claim against plaintiff for the funds deposited in the Registry of the court.

/s/ JOHN L. RASBERRY.

Subscribed and sworn to before me this 15th day of May, 1950.

/s/ ANNE DOYLE,

Notary Public in and for
Said County and State.

My Commission expires June 1, 1951. [62]

Exhibit A

August 6, 1943.

Burges, Burges, Scott, Rasberry & Hulse,
El Paso, Texas.

Confirming our verbal agreement, the undersigned hereby employs you to prosecute and assert the claims of undersigned to any award made to undersigned under the provisions of the convention between the United States of America and Mexico, dated November 19, 1941, and Public Law 814 adopted by the 77th Congress of the United States, and to defend any claims asserted to any such award by Ben Williams, et al, and the Security-First National Bank of Los Angeles. Undersigned agrees to pay you for any services rendered in this connection as follows:

1. Should the matters in controversy be settled by agreement prior to the filing of any suit by

undersigned or the parties named, you shall receive 5% of any sums realized by undersigned or either of them.

2. Should the matters in controversy be disposed of by litigation or settled by agreement after the filing of any suit or legal procedure by undersigned or the other claimants mentioned, you shall receive 15% of all sums realized by undersigned or either of them.

3. It is understood that in arriving at your fee, any sum deducted from the award by the law firm of Garfield, Baldwin & Vrooman or ultimately allowed them for the prosecution of such claims before the Mexican Claims Commission shall not be taken into consideration in arriving at the sums realized by undersigned.

4. It is also understood that undersigned shall pay all expenses incurred by you in the handling of this matter, including traveling expenses, telephone and telegraph bills, etc., and the fees of any out of state attorney or attorneys whom you may deem it necessary to employ for the purpose of prosecuting or defending any litigation instituted outside the State of Texas to protect the undersigned.

Yours very truly,

PALOMAS LAND AND
CATTLE COMPANY,

By /s/ MARSHALL B. STEPHENSON,
President. [63]

HUECO CATTLE COMPANY,
By /s/ MARSHALL B. STEPHENSON,
President.

Approved:

BURGES, BURGES, SCOTT,
RASBERRY & HULSE,
By /s/ J. L. RASBERRY. [64]

Exhibit B

Agreement

This Agreement made as of the 29th day of October, 1943, by and between Palomas Land and Cattle Company, a California corporation, as Party of the First Part, hereinafter called "Palomas," Security-First National Bank of Los Angeles, a National Banking Association, as Party of the Second Part, hereinafter called "Bank," and James R. Garfield, Arthur D. Baldwin and Clare M. Vrooman, of Cleveland, Ohio, individually and as partners engaged in the practice of law under the firm name of Garfield, Baldwin & Vrooman, collectively as Party of the Third Part, hereinafter for convenience sometimes referred to as "Trustees,"

Witnesseth, that Whereas:

1. Under date of August 26, 1943, pursuant to the provisions of the Settlement of Mexican Claims Act of 1942, the American Mexican Claims Commission entered an award in favor of Palomas in the amount of \$1,686,056.00 and certified such award to the Secretary of the Treasury for payment to Palomas in accordance with the provisions of said

Act of 1942, said award having been made on that certain claim of Palomas theretofore pending before the General Claims Commission of the United States of America and United Mexican States under Docket No. 2067 of that Commission;

2. The parties to this agreement assert conflicting claims to said award: the conflicting claims of Palomas and Bank are now the subject of that certain action in the District Court of the United States for the District of Columbia, entitled: "Security-First National Bank of Los Angeles, etc., Plaintiff, vs. Palomas Land and Cattle Company, etc., et al., Defendants," designated as Civil Action No. 21295 on the records of said Court; [65]

3. The parties hereto are desirous of resolving their conflicting claims to said award and of compromising and settling all differences among them in the manner hereinafter set forth;

Now, Therefore, in consideration of the promises and the respective undertakings on the part of the parties hereto, as hereinafter set forth, it is hereby agreed as follows:

I.

Palomas and Bank shall, and do hereby, assign, transfer and set over unto the Trustees all of their respective rights, titles and interests in and to said award (including all sums paid or payable on said award), in trust nevertheless, and the Trustees shall, and hereby covenant and agree to, hold the same, together with all their rights, titles and interests in and to said award (including all sums paid or pay-

able on said award), in trust for the following purposes:

(a) To collect, receive and receipt for all sums paid or payable on said award and the Trustees shall have full power so to do;

(b) To promptly, upon receipt of any sums paid or payable on account of said award, disburse the same as follows:

A seven-nineteenths ($7/19$ ths) part to Palomas;

A seven-nineteenths part to Bank;

The remaining five-nineteenths ($5/19$ ths) part to Garfield, Baldwin & Vrooman, (the Trustees).

Pending actual disbursement of said funds by the Trustees, as above provided, the Trustee shall maintain the same in a trust account with the Cleveland Trust Company of Cleveland, Ohio, or with some other responsible bank or trust company. The Trustees shall execute this trust without charge. No expenses shall be incurred without first obtaining the written approval of Palomas and Bank. The Trustees shall not make or permit any substitution under any power of attorney heretofore or hereafter given them to [66] enable them to effect collection of sums payable on said award without first causing the substitute to execute an undertaking to hold all funds coming to his hands in trust for the purposes and on the terms and conditions herein set forth.

II.

Each party to this agreement shall, and does hereby, release and forever discharge each other party to this agreement, and Bank, in addition, shall and does hereby release and forever discharge Hueco Cattle Company, a Texas corporation, and Marshall B. Stephenson and each of them of and from all claims, demands, actions and causes of action of whatsoever character, now existing or hereafter arising and based upon any contract, agreement, instrument, transaction, matter, happening or thing of whatsoever nature to the date hereof, except claims, demands, actions or causes of action based upon this agreement.

III.

Each party hereto on the demand of any other party hereto shall execute and deliver such further instrument or instruments as may be necessary or convenient to enable the Trustees to collect any sums paid or payable on account of said award and to disburse the same as hereinabove set forth, or to otherwise effectuate the purposes of this agreement.

IV.

In the event that all sums paid or payable on the aforesaid award shall not have been sooner collected and disbursed by the Trustees, as provided in Paragraph I hereof, the trust created in and by said Paragraph I shall terminate on the 28th day of October 1, 1964, and thereupon any funds in the hands of the Trustees collected on said award shall

be forthwith disbursed in accordance with the provisions of Paragraph I hereof, and said award (to the extent of and including any sums unpaid on account thereof) shall be disposed of by the Trustees in such manner as the parties hereto may agree upon in writing, and failing such agreement, then the Trustees shall distribute said award (to the extent of [64] and including any sums unpaid on account thereof), discharged of any trust, as follows:

An undivided seven-nineteenths ($7/19$ ths) part to Palomas;

An undivided seven-nineteenths ($7/19$ ths) part to Bank;

The remaining undivided five-nineteenths ($5/19$ ths) part to Garfield, Baldwin & Vrooman, (the Trustees).

V.

Palomas, within thirty (30) days from the date hereof, shall cause to be executed, and shall deliver to Bank, a good and sufficient instrument or instruments therein and whereby Palomas and its President, Marshall B. Stephenson, and each of them, release and forever discharge Compania Palomas de Terrenos y Ganado, S. A., a Mexican corporation, hereinafter called "Compania Palomas," Nacional Ganadera, S.A. de C.V., a Mexican corporation, hereinafter called "Nacional Ganadera," Ben F. Williams, A. J. Kalin, W. C. Greene, F. A. Villalobos, Charles E. Wiswall and Alfonso Morales, and each of them, of and from all claims, demands, actions and causes of action of whatsoever character,

now existing or hereafter arising and based upon any contract, agreement, instrument, transaction, matter, happening or thing of whatsoever nature to the date hereof.

VI.

Bank, within thirty (30) days from the date hereof, shall cause to be executed, and shall deliver to Palomas, a good and sufficient instrument or instruments wherein and whereby Compania Palomas, Nacional Ganadera, said Ben F. Williams, A. J. Kalin, W. C. Greene, F. A. Villalobos, Charles E. Wiswall and Alfonso Morales, and each of them, release and forever discharge Palomas, said Marshall B. Stephenson and Hueco Cattle Company a Texas corporation, and each of them, of and from all claims, [68] demands, actions and causes of action of whatsoever character, now existing or hereafter arising and based upon any contract, agreement, instrument, transaction, matter, happening or thing of whatsoever nature to the date hereof.

VII.

Any notice which any party may desire to give to any other party may be given by United States registered mail addressed to Palomas at 1100 First National Bank Building, El Paso, Texas, to Bank at its Head Office, Sixth and Spring Streets, Los Angeles, California, and to the Trustees at 1401 Midland Building, Cleveland, Ohio, subject to the right of any party to designate for itself a different address by notice similarly given.

In Witness Whereof, the parties hereto have executed this agreement as of the day and year first above written.

PALOMAS LAND AND
CATTLE COMPANY,

[Corporate Seal.]

By /s/ MARSHALL B. STEPHENSON,
President.

By /s/ SADIE BROWN,
Secretary.

Party of the First Part
and "Palomas."

SECURITY-FIRST NATIONAL
BANK OF LOS ANGELES,

[Corporate Seal.]

By /s/ ROBT. J. SEVITZ,
Vice President.

By /s/ RANDALL BOYD,
Asst. Sec.

Party of the Second Part
and "Bank."

/s/ JAMES R. GARFIELD.

/s/ ARTHUR D. BALDWIN.

/s/ CLARE M. VROOMAN.
GARFIELD, BALDWIN &
VROOMAN,

By /s/ JAMES R. GARFIELD,
Collectively Party of the Third
Part and "Trustees." [69]

Exhibit C

December 21, 1943.

El Paso National Bank,
El Paso, Texas.

Attention: Mr. H. A. Jacobs.

Gentlemen:

We hand you herewith check in the sum of \$177,-
035.88, dated December 17, 1943, and numbered
4098, drawn on the Cleveland Trust Company by
Garfield, Baldwin & Vrooman, Trustees. Please
effect collection of said check and deposit the pro-
ceeds as follows:

- (1) To the account of Burges, Burges,
Scott, Rasberry & Hulse, 15% there-
of, or\$ 26,555.38
- (2) To the account of the Palomas Land
and Cattle Company, the balance,
or 150,480.50

Yours very truly,

BURGES, BURGES, SCOTT.

RASBERRY & HULSE,

By /s/ J. L. RASBERRY.

PALOMAS LAND AND
CATTLE COMPANY,

By /s/ MARSHALL B. STEPHENSON,
President.

JLR/b

Encl. [70]

Exhibit D

Palomas Land & Cattle Co.

Statement of Claim Recoverable and Recovered

	Cash Paid in	
	1943—30%	Total Claim
Total value of claim	\$505,816.80	\$1,686,056.00
Less, 5% retained by the Commission.....	25,290.84	84,302.80
	<hr/> 480,525.96	<hr/> 1,601,753.20
Less, fee deducted or to be deducted by Garfield, Baldwin & Vrooman	126,454.20	421,514.00
	<hr/> 354,071.76	<hr/> 1,180,239.20
Portion paid or to be paid by the Trustees under the agreement attached hereto to Security-First National Bank of Los Angeles by way of compromise and settlement of the Bank's claim to the award	177,035.88	590,119.60
	<hr/> 177,035.88	<hr/> 590,119.60
Payment made or to be made to Burges, Burges, Scott, Rasberry & Hulse upon receipt by Palomas Land & Cattle Co. of cash upon account of the award, being a contingent interest assigned to them for legal services at the time the con- flicting terms of the Security-First National Bank of Los Angeles were asserted	26,555.38	88,517.94
	<hr/>	<hr/>
Net Cash Received by Palomas Land & Cattle Co. in 1943	\$152,480.50	
	<hr/>	
Net remaining to Palomas Land & Cattle Co.— credited to cost of stock of Cia. Palomas de Terrenos y Ganado, S.A.		\$ 501,601.66
		<hr/> <hr/>

Exhibit E

Palomas Land & Cattle Co.

Statement Relative to Fees Paid in 1943

In accordance with a statement made by the President of Palomas Land and Cattle Company as shown in the attached copy of the minutes of a Directors Meeting held September 3rd, 1943, and which recounts the history of a claim filed by the company against the Government of Mexico, and also in accordance with an agreement entered into October 29th, 1943, by and between Palomas Land and Cattle Company, Security-First National Bank of Los Angeles and James R. Garfield, Arthur D. Baldwin and Clare M. Vrooman, a copy of which is attached hereto, Palomas Land and Cattle Company received the net amount disclosed by the statement following, after Garfield, Baldwin & Vrooman deducted their fee and paid and delivered the sum thereon shown to the Security-First National Bank of Los Angeles, all in accordance with the settlement agreement above referred to. The amount paid Burges, Burges, Scott, Rasberry & Hulse as shown on the Form 1099 was by virtue of a contingent interest assigned to them for legal services at the time the conflicting claims of the Security-First National Bank of Los Angeles were asserted:

	Payment Made in	
	1943—30%	Total Claim
Total value of claim	\$505,816.80	\$1,686,056.00
Less, 5% retained by the Commission.....	25,290.84	84,302.80
	480,525.96	1,601,753.20
Less, fee to be deducted by Garfield, Baldwin & Vrooman	126,454.20	421,514.00
	354,071.76	1,180,239.20
Portion paid or to be paid by the Trustees under the agreement attached hereto to Security-First National Bank of Los Angeles by way of compromise and settlement of the Bank's claim to the award	177,035.88	590,119.60
	177,035.88	590,119.60
Payment made or to be made to Burges, Burges, Scott, Rasberry & Hulse upon receipt by Palomas Land & Cattle Co. of cash upon account of the award, being 15% of Net recovery to Palomas as received	26,555.38	88,517.94
Net remaining to Palomas Land & Cattle Company	\$150,480.50	\$501,601.66

Exhibit F

May 31, 1947.

Mr. James R. Garfield,

Garfield, Baldwin, Jamison, Hope & Ulrich,
1425 Guardian Building,
Cleveland 14, Ohio.

In re: Palomas Land and Cattle Company
General Mexican Claim.

Dear Mr. Garfield:

I received in due time your letter of May 26, 1947, enclosing Voucher (Form 406 Treasury Department) covering the third installment on the Palomas General Mexican Claim of 6.5%, the net proceeds of which appear to be \$104,113.96. Since Marshall's death, his widow, Letha L. Stephenson, who now lives in California, has been President of the company. However, P. W. Pogson is Vice-President and Percy W. Pogson, Jr., is Secretary-Treasurer. We were therefore able to complete the voucher at El Paso and now enclose the same to you herewith duly executed.

As you know, our firm is entitled to 15% of the proceeds due Palomas Land and Cattle Company as attorney's fees. Accordingly, for convenience, we respectfully request that in disbursing the amount due Palomas Land and Cattle Company you make two checks, one for 15% of the amount, payable to this firm, and one for the balance payable to Palomas Land and Cattle Company.

With kind personal regards and best wishes, beg
to remain

Yours sincerely,

J. L. RASBERRY.

JLR/vb

Encls.

cc: Mr. P. W. Pogson, Jr.

Mrs. Letha L. Stephenson. [73]

Exhibit G

May 31, 1947.

Mrs. Letha L. Stephenson,
462 Mesa Road,
Santa Monica, California.

Dear Letha:

You will note from the attached copy of letter from Mr. Garfield that we have received Voucher (Form 406 Treasury Department) for the third installment on the Palomas General Mexican Claim and from copy of reply attached hereto that we have completed the voucher here at El Paso and returned the same to Mr. Garfield. For your information the voucher was for the total sum of \$109,593.64 from which was deducted 5%, or \$5,479.68, which is due the Commission under the Act for administration expense, leaving a net amount available of \$104,113.96. As you know, the controversy with Ben Williams, et al., was disposed of by an agreement whereby Garfield, et al., were appointed Trustees for the purpose of disbursing the net pro-

ceeds. This agreement provided that 5/19ths would be retained by Garfield, et al., as their attorney's fees for prosecuting the claim, the balance to be equally disbursed to Palomas Land and Cattle Company and Ben Williams, et al. In other words, Palomas would receive 7/19ths and Ben Williams, et al., 7/19ths, under the terms of this agreement. As I figure it roughly, the amount due Palomas would be \$38,409.10 from which is deducted our attorney's fees of 15%, or \$5,761.36, leaving a net amount to be payable to Palomas of \$32,647.74.

I know that we have roughly carried \$50,000.00 as the net amount due Palomas out of each 10% payment. However, you will note from the attached statement of Mexican claims which accompanied the voucher that the amount available for distribution on this claim is 6.5%, Palomas having in the past received 40% which accounts for the fact that Palomas' part is less than \$50,000.00. [74]

This payment came at a rather unfortunate time in view of the fact that we have been in the midst of trying to get a settlement with the government on the estate tax and it may result in increasing the value placed on Palomas stock. However, Percy and I had a conference this morning and we may get by with the valuation of the claim at 10% in view of the fact that only 6.5% was disbursed and there is really no assurance that any additional sums will be paid for payment, of course, depends on Mexico keeping up her annual payments. In any event, from our viewpoint and aside from the estate tax return, the situation is encouraging for

apparently there will be no further claims allowed and if Mexico does continue her payments, we should eventually receive approximately 99.5% of the total amount allowed. You will note that the payment from Mexico is due in November of each year which means that there is a possibility of another 10% distribution the latter part of this year or the first of next.

Percy will keep you advised as to our progress on the estate tax return.

With kind personal regards and best wishes, beg to remain

Yours sincerely,

J. L. RASBERRY.

JLR/vb

Encls.

cc: Mr. P. W. Pogson, Jr. [75]

Exhibit H

Law Offices of
Garfield, Baldwin, Jamison, Hope & Ulrich
1425 Guardian Building
Cleveland 14, Ohio

July 1, 1947.

Mr. J. L. Rasberry,
Burges, Scott, Rasberry & Hulse,
First National Bank Bldg.
El Paso, Texas.

In re: Palomas Land and Cattle Company
General Mexican Claim:

Dear Mr. Rasberry:

The check covering the third installment on the General Claim has just been received, in the amount of \$104,113.96. Distribution thereof is being made as indicated below:

1. Total amount of the award in this case is.....	\$1,686,056.00	
2. The third installment, based on 6.5% of the award would figure	\$ 109,593.64	
3. Less 5% charge made by the government.....	5,479.68	
4. Net payment by government on third install- ment	\$ 104,113.96	
5. Distribution of net funds:		
7/19 to Security First National Bank of Los Angeles.....	\$38,357.77	
7/19 available for Palomas Land and Cattle Company's share:		
15% issued to the Com- pany and your firm, its attorneys	\$ 5,753.66	
85% to the Company	32,604.11	38,357.77
5/19 to this firm		27,398.42
		\$ 104,113.96

The two checks, representing the Palomas Land and Cattle Company's share, are enclosed, and I trust that the manner of issuance will meet with your requirements. Since the Vice President and Secretary-Treasurer signed the voucher, it might be desirable to ask that the endorsement of the check by the Palomas Land and Cattle Company carry the signatures of both of those officers on the check which has been made payable to your firm and

Palomas. If you see any objection to such procedure, I shall be glad to hear from you regarding it. I am acting in Mr. Garfield's absence, and, of course, wish to do all that is necessary to insure for the disposition of the funds in accordance with the Agreement.

Mr. Garfield and I are happy to cooperate with you in this matter.

Yours very truly,

/s/ A. D. BALDWIN.

ADB:mb

cc to Mr. MM. [77]

Exhibit I

July 8, 1947.

Mr. P. W. Pogson, Jr.,
Mills Building,
El Paso, Texas.

Dear Percy:

I hand you herewith copy of a letter from Garfield, et al., which is self-explanatory, together with the two checks which accompany the same, one for \$32,604.11 payable to the Palomas Land and Cattle Company and the other for \$5,753.66 payable to the Palomas Land and Cattle Company and ourselves, which together aggregate the sum of \$38,357.77. You will note that the suggestion is made that you and your father endorse the checks since you were the officers signing the original voucher. Accordingly, I have placed a typewritten endorsement on

the two checks in accordance with this suggestion. If you have the seal, it might be well to place the seal thereon as well. As and when the \$5,753.66 check, which evidences our 15% part as per contract with Palomas Land and Cattle Company, has been endorsed, please return the same to us.

Please also check the figures contained in Garfield's letter and advise me whether or not you approve the same.

Yours very truly,

J. L. RASBERRY.

JLR:vb

Encls.

cc: Mrs. Letha L. Stephenson.

Received from Burges, Scott, Rasberry & Hulse the above checks on July 9th, 1947.

/s/ ANONA ROBINSON. [78]

Exhibit J

January 24, 1948.

Air Mail.

Mr. James R. Garfield,
Garfield, Baldwin, Jamison, Hope & Ulrich,
1425 Guardian Building,
Cleveland 14, Ohio.

In re: Palomas Land and Cattle Company
General Mexican Claim

Dear Mr. Garfield:

I received today your letter of January 22, 1948, enclosing voucher (Form 406 Treasury Department)

covering the fourth installment of 6% on the Palomas General Mexican Claim, the net proceeds of which appear to be \$96,105.19. As you know, Mrs. Letha L. Stephenson, who lives in California, is president of the company. However, P.W. Pogson is vice-president and Percy W. Pogson, Jr. is secretary and treasurer. We were therefore able to complete the voucher at El Paso and now enclose the same to you herewith duly executed. As you know, our firm is entitled to 15% of the proceeds due Palomas Land and Cattle Company as attorneys' fees. Accordingly, for convenience, we respectfully request that in disbursing the amount due Palomas Land and Cattle Company you make two checks, one for 15% of the amount, payable to this firm and the Palomas Land and Cattle Company, and one for the balance payable to the Palomas Land and Cattle Company.

With kind personal regards and best wishes, beg to remain

Yours sincerely,

J. L. RASBERRY.

JLR: vb

Encl.

cc: Mrs. Letha L. Stephenson.

Mr. Henry T. Moore. [79]

Mr. P. W. Pogson, Jr.

Exhibit K

March 4, 1948

Mr. J. L. Rasberry,
 Burges, Scott, Rasberry & Hulse,
 First National Bank Bldg.,
 El Paso, Texas

In re: Palomas Land and Cattle Company
 General Mexican Claim

Dear Mr. Rasberry:

The check covering the fourth installment on the General Claim has just been received, in the amount of \$96,105.19. Distribution thereof is being made as indicated below:

1. Total amount of the award in this case is.....	\$1,686,056.00
2. The current installment, based on 6% of the award would figure	\$ 101,163.36
3. The charge made by the Government— 5% thereof	5,058.17
4. Net payment by Government on this installment..	\$ 96,105.19
5. Distribution of net funds:	
7/19 to Security First National Bank of Los Angeles	\$35,407.17
7/9 available for Palomas Land and Cattle Company's share:	
15% issued to Com- pany and your firm, its attorneys	\$ 5,311.08
85% to the Company	30,096.09
	<hr/>
	35,407.17
5/19 to this firm	25,290.85
	<hr/>
	\$ 96,105.19

Exhibit L

December 27, 1948.

Air Mail

Mr. James R. Garfield,
Garfield, Baldwin, Jamison, Hope & Ulrich,
1425 Guardian Building,
Cleveland 14, Ohio.

In re: Palomas Land and Cattle Company.
General Mexican Claim.

Dear Mr. Garfield:

I received today your letter of December 22, 1948, enclosing voucher (Form 406, Treasury Department) covering the fifth installment of 6.4% on the Palomas General Mexican Claim, the net proceeds of which appear to be \$102,512.20. As you know, Mrs. Letha L. Stephenson, who lives in California, is president of the company. However, P. W. Pogson is Vice-President and Percy W. Pogson, Jr. is Secretary-Treasurer. We were therefore able to complete the voucher at El Paso and now enclose the same to you herewith, duly executed. As you know our firm is entitled to 15% of the proceeds due Palomas Land and Cattle Company as attorneys' fees. Accordingly, for convenience, we respectfully request that in disbursing the amount due Palomas Land and Cattle Company you make two checks, one for 15% of the amount, payable to this firm and the Palomas Land and Cattle Com-

pany, and one for the balance payable to Palomas Land and Cattle Company.

With kind personal regards and best wishes, beg to remain

Yours sincerely,

J. L. RASBERRY.

JLR:vb.

Enclos.

cc: Regular Mail

Mr. P. W. Pogson, Jr.,

Mrs. Letha L. Stephenson,

Mr. Henry T. Moore.

Exhibit M

Law Office of

Garfield, Baldwin, Jamison, Hope & Ulrich
1425 Guardian Building
Cleveland 14, Ohio

February 4, 1949.

Mr. J. L. Rasberry,
Burgess, Scott, Rasberry & Hulse,
First National Bank Bldg.,
El Paso, Texas.

In re: Palomas Land Cattle Company.
General Mexican Claim.

Dear Mr. Rasberry:

The check covering the fifth installment on the

General Claim is being deposited today, in the amount of \$102,512.20. Distribution thereof is being made as indicated below:

1. Total amount of the award in this case is.....	\$1,686,056.00
2. The current installment, based on 6.4% of the award would figure	\$ 107,907.58
3. The charge made by the Government— 5% thereof	5,395.38
4. Net payment by Government on this installment..	\$ 102,512.20
7/19 to Security First National Bank of Los Angeles	\$37,767.65
7/19 available for Palomas Land and Cattle Company's share: 15% issued to Company and your firm, its attor- neys, being	\$ 5,665.14
85% to the Company	32,102.51
	<hr/>
	37,767.65
5/19 to this firm	26,976.90
	<hr/>
	\$ 102,512.20
	<hr/> <hr/>

The two checks, representing the Palomas Land and Cattle Company's share, are enclosed, and I trust that the manner of issuance will meet with your requirements. As in the past, it might be well to have the Vice-President and Secretary-Treasurer, who signed the voucher, endorse the check

payable to the Company and your firm. All good wishes,

Sincerely yours,

/s/ JAMES R. GARFIELD.

JRG:mb

cc to Mr. MM

Receipt of Copy Acknowledged.

[Endorsed]: Filed May 18, 1950.

[Title of District Court and Cause.]

AFFIDAVIT OF ARTHUR D. BALDWIN IN
SUPPORT OF ORDER TO SHOW CAUSE

State of Ohio,

Cuyahoga County—ss.

Arthur D. Baldwin, being first duly sworn, deposes and says that he is the plaintiff in the above captioned action; that he is one of the persons named in a certain Trust Agreement dated October 29, 1943, by and between Palomas Land and Cattle Company, Security-First National Bank of Los Angeles, and James R. Garfield, Arthur D. Baldwin and Clare M. Vrooman, in which agreement said James R. Garfield, Arthur D. Baldwin and Clare M. Vrooman are named as Trustees; that a true and exact photostat of said agreement is attached as an exhibit to [98] this affidavit and marked "Exhibit 1"; that this affiant became associated as a partner with said James R. Garfield in the practice of law in 1918 and continued as a partner of said James R. Garfield until the death of said James R. Garfield

in 1950; that the said James R. Garfield and this affiant associated themselves with the said Clare M. Vrooman as partners in the practice of law in 1933, which partnership continued until the death of said Clare M. Vrooman in February of 1944; that affiant is personally familiar with the facts as hereinafter set forth or has such knowledge of said facts that the statements hereinafter set forth can be made as of his own personal knowledge.

Affiant further says that sometime subsequent to September 8, 1923, the exact date of which is now unknown, James R. Garfield and this affiant filed a claim for damages accruing to the Palomas Land and Cattle Company, a California corporation (hereinafter referred to as "Palomas"), as the owner of the capital stock of Compania Palomas, a Mexican corporation, which in turn owned the Palomas Ranch of approximately two million acres in Mexico south of El Paso, Texas, and near Juarez, Mexico; that said claim was based upon an order of nullification of the Diaz title under which said ranch was held, and said claim was presented pursuant to the Convention between the United States and Mexico dated September 8, 1923.

Affiant further says that subsequently another claim was filed in behalf of said Palomas with the General Claims Commission established pursuant to the General Claims Protocol between the United States and Mexico dated April 24, 1934; that no award had been made upon said claim as of the date of the expiration of the Commission created under such Protocol in 1937.

Affiant further says that under date of Novem-

ber 17, 1941, the Governments of the United States and the United Mexican States entered into a treaty providing for the payment of \$40,000,000 by Mexico to cover the settlement of claims specifically included in Public Law 814 of the 77th Congress, known as the Settlement of Mexican Claims Act of 1942; that in 1943 said Public Law was implemented by the appointment of a Commission for the adjudication of such claims;[99] that amongst the claims adjudicated by said General Claims Commission were awards in favor of said Palomas in the amounts of \$1,584,950.20 and \$101,105.80, respectively.

Affiant further says that he and his partners, James R. Garfield and Clare M. Vrooman, were the sole and only attorneys for Palomas in the prosecution of said claim until sometime during the year 1940; that Palomas, sometime during the year 1940, employed John L. Rasberry, an attorney-at-law practicing in El Paso, Texas, to handle, to some extent, the prosecution of said claim; that under date of May 15, 1941, affiant and his partners received a letter from said Palomas signed by Marshall B. Stephenson, as President, a phostat of said letter being attached hereto and marked "Exhibit 2"; that the person referred to in said letter, wherein it was said "there was nothing left for us to do but to proceed with the employment of other counsel," was said John L. Rasberry; that in reply to said letter said James R. Garfield advised said Marshall B. Stephenson by letter dated May 21, 1941, a photo-stat of which is attached hereto and marked "Ex-

hibit 3," that he might recognize associate counsel but he considered that his firm was still representing Palomas in the prosecution of said General Claim.

Affiant further says that subsequent to the exchange of said correspondence, said John L. Rasberry and Marshall B. Stephenson came to Cleveland to discuss with affiant and his partners the future representation of Palomas in regard to the prosecution of said claim, and that as a result of said conference a general division of the representation of Palomas was agreed upon, and on June 24, 1941, a letter was jointly dictated by the said James R. Garfield, John L. Rasberry and Marshall B. Stephenson to Palomas, a photostat of which letter is attached hereto and marked "Exhibit 4"; that the original of said Exhibit 4 was delivered to said Marshall B. Stephenson and copies thereof were delivered to John L. Rasberry in the presence of affiant and his partners.

Affiant further says that during the year 1941 and 1942 there was correspondence between Robert J. Sevitz, then Assistant Vice President of the [100] Security-First National Bank of Los Angeles, and now its Vice President, and the said John L. Rasberry, concerning general matters of Palomas and its relations with other corporations; that copies of said correspondence were sent to affiant or his partners or were examined by affiant and his partners prior to any award by the Commission.

Affiant further states that upon the publication of the award on June 15, 1943, notification of such

award was given to said Marshall B. Stephenson and John L. Rasberry as representatives of Palomas; that in July of 1943 said John L. Rasberry conferred with your affiant and said James R. Garfield at their offices in Cleveland and subsequent to said meeting said James R. Garfield and John L. Rasberry, as co-counsel for Palomas, went to Washington to discuss said award with members of the Commission and with members of a group who had purchased the stock of the Mexican corporation hereinbefore referred to and who claimed title to said award; that in the discussion concerning the title to said award said John L. Rasberry spoke as counsel for Palomas.

Affiant further says that in August of 1943, extended discussions were had between affiant and his partners and said John L. Rasberry concerning the advisability of filing a petition for review of said award; that thereafter it was agreed that no petition for review should be filed and on August 26, 1943, said award was made final and certified to the Treasury of the United States for payment; that immediately after said certification, said Clare M. Vrooman met with John L. Rasberry and Marshall B. Stephenson in El Paso, Texas, and from there said John L. Rasberry and Clare M. Vrooman went to Los Angeles to arrange for the preparation and execution of a proper power of attorney by Palomas in order to collect said award; that said arrangements were made through the efforts of John L. Rasberry, Clare M. Vrooman and William T. Coffin, an attorney-at-law practicing in Los Angeles; that

said power of attorney was subsequently filed with said Commission.

Affiant further states that on September 20, 1943, affiant and his partners received a check from the Treasury Department of the United States in the amount of \$480,525.96, representing a 30% payment upon said award; that thereafter, on the 21st day of September, 1943, an action was filed in the United States District Court of the District of Columbia by the Security-First National Bank of Los Angeles against Palomas, Henry Morgenthau, Jr., as Secretary of the Treasury, and W. A. Julian, as Treasurer of the United States, which action was known as Case No. 21295; that in the preparation of the pleadings in said case and in the taking of depositions therein, John L. Rasberry actively participated with affiant and his partners, which activities occurred in Washington, D. C., El Paso, Texas, and Los Angeles, California.

Affiant further says that simultaneously with the filing of said action in the District Court of the District of Columbia, another action was filed by the Security-First National Bank of Los Angeles against Palomas in the Superior Court of the State of California for the County of Los Angeles, which cause was known as Case No. 488283 on the dockets of said Court; that in the defense of said cause said John L. Rasberry actively participated with the affiant and his partners.

Affiant further says that depositions were started in Los Angeles on October 26, 27, 28, 29, 1943, which depositions were intended to be used in such litiga-

tion; that present at such depositions representing Palomas were said Clare M. Vrooman, a partner of affiant, John L. Rasberry and William T. Coffin; that before said depositions were completed the Agreement of Trust dated October 29, 1943, attached hereto as Exhibit 1, was agreed upon by the parties thereto as a settlement of the controversy existing between Palomas and the Security-First National Bank of Los Angeles; that said John L. Rasberry acted as counsel for Palomas in the negotiation and preparation of said Trust Agreement; that subsequent to the negotiation and execution of said Trust Agreement the litigation theretofore filed in the District Court of the District of Columbia and the Superior Court of the County of Los Angeles was dismissed, and the check of the Treasury of the United States, in the amount of \$480,525.96 was deposited by the Trustees named in said agreement in a trust account and collected. [102]

Affiant further says that on December 17, 1943, said Clare M. Vrooman, acting in behalf of the Trustees, forwarded by letter to John L. Rasberry the entire share due Palomas of the first installment of said award in the sum of \$177,035.88, a photostat of which letter is attached hereto and marked "Exhibit 5," and a photostat of said check, together with the endorsement of Marshall B. Stephenson as President of said Palomas Land and Cattle Company, is also attached hereto and marked "Exhibit 6"; that said John L. Rasberry received 15% of such amount as fees; that subsequently thereto a letter was received from said John L. Rasberry

dated January 10, 1944, requesting all subsequent checks to be payable to Palomas Land and Cattle Company and the firm of Burges, Burges, Scott, Rasberry & Hulse, of which firm said John L. Rasberry is a partner, a photostat of said letter being attached hereto and marked "Exhibit 7."

Affiant further says that in the fall of 1945 a second installment on said award became available and upon its collection said James R. Garfield, acting in behalf of said Trustees, wrote a letter, dated October 25, 1945, to John L. Rasberry, a photostat of which letter is attached hereto and marked "Exhibit 8," forwarding the share of Palomas in a single check made payable jointly to Palomas and the firm of Burges, Scott, Rasberry & Hulse in the amount of \$59,011.96, a photostat of said check being attached hereto and marked "Exhibit 9"; that said check shows the endorsement of Marshall B. Stephenson as President of Palomas and that of J. L. Rasberry as a partner of the firm of Burges, Scott, Rasberry & Hulse.

Affiant further says that subsequent to October 25, 1945, and prior to May 31, 1947, the exact date of which is not known to this affiant, said Marshall B. Stephenson died and he was succeeded as President of Palomas by his widow, one Letha L. Stephenson; that the other officers, so far as affiant knows, did not change after the death of said Marshall B. Stephenson.

Affiant further says that during the spring of 1947 a third installment upon said award became payable and in connection with the obtaining of the

requisite signatures to the voucher to be forwarded to the Treasury Department of [103] the United States in order to obtain said third installment, the Trustees received a letter from John L. Rasberry dated May 31, 1947, requesting that the amount due Palomas be disbursed in two checks, one payable jointly to Palomas and the firm of Burges, Scott, Rasberry & Hulse in the amount of 15% of the amount due Palomas, and a second check payable solely to Palomas for the balance thereof; that a copy of said letter was sent to Letha L. Stephenson; that a photostat of said letter of May 31, 1947, is attached hereto and marked "Exhibit 10;" that enclosed in the same envelope with said Exhibit 10 was another letter addressed to the Trustees from John L. Rasberry bearing date of May 31, 1947, and marked "Confidential," a photostat of which letter is attached hereto and marked "Exhibit 11;" that attached to said letter was a certain employment agreement and assignment executed by Marshall B. Stephenson as President of Palomas and Marshall B. Stephenson as President of Hueco Cattle Company addressed to Burges, Burges, Scott, Rasberry & Hulse, assigning 15% of any sums realized by Palomas out of its claim made under the provisions of Public Law 814 in the event such matters are disposed of by litigation or settled by agreement "after the filing of any suit or legal procedure"; that a photostat of said assignment is attached hereto and marked "Exhibit 12;" that in reply to said letters of May 31, 1947, attached hereto as Exhibits 10 and 11, said James R. Garfield,

as Trustee, under date of June 3, 1937, advised said John L. Rasberry that the disbursement of the funds collected from said claim "is to be made in accordance with the terms of the contract of October 29, 1943;" that a photostat of said letter is attached hereto and marked "Exhibit 13;" that on June 4, 1947, said John L. Rasberry replied to said Exhibit 13 by a letter to said James R. Garfield, a photostat of which letter is attached hereto and marked "Exhibit 14."

Affiant further states that prior to July 1, 1947, a third installment on said award was collected in the amount of \$104,113.96, which sum in turn was disbursed in accordance with the terms of said Trust Agreement, and the proceeds available for the benefit of Palomas were transmitted by a letter dated July 1, 1947, from your affiant, acting in behalf of said Trustees, to said John L. [104] Rasberry, a photostat of which letter is attached hereto and marked "Exhibit 15;" that there was enclosed in said letter a check of the Trustees payable to the Palomas Land and Cattle Company and Burges, Scott, Rasberry & Hulse, its attorneys, in the amount of \$5,753.66, which check represents 15% of the total amount due Palomas and which check bears the endorsement of P. W. Pogson as Vice President and Percy W. Pogson, Jr., as Secretary and Treasurer of the Palomas Land and Cattle Company, and the endorsement of John L. Rasberry as a partner of the firm of Burges, Scott, Rasberry & Hulse; that a photostat of said check, together with endorsements, is attached hereto and marked "Exhibit 16."

Affiant further states that in January of 1948 a fourth installment of \$96,105.19 became available upon said award and by letter dated January 22, 1948, said James R. Garfield, acting in behalf of said Trustees, requested John L. Rasberry to obtain the proper execution of the voucher by the officers of Palomas; that a photostat of said letter is attached hereto and marked "Exhibit 17;" that subsequently, on January 24, 1948, said John L. Rasberry returned said vouched duly executed by the Vice President and Secretary-Treasurer of Palomas and requested that 15% of the proceeds due Palomas be paid by a joint check to his firm and Palomas; that a copy of said letter was sent to Mrs. Letha L. Stephenson and P. W. Pogson, President and Vice President, respectively, of Palomas, and to Henry T. Moore, whom your affiant believes to be an attorney-at-law in Los Angeles, California, then representing the personal affairs of said Letha L. Stephenson; that a photostat of said letter dated January 24, 1948, is attached hereto and marked "Exhibit 18;" that thereafter said fourth installment was collected by said Trustees and on March 4, 1948, said Trustees delivered to John L. Rasberry, as the attorney for Palomas, the proceeds available to Palomas in the total amount of \$35,407.17; that a photostat of the letter transmitting said checks is attached hereto and marked "Exhibit 19;" that one of the checks enclosed in said letter marked Exhibit 19 was a check for 15% of the total amount due Palomas, payable to the order of Palomas and Burges, Scott, Rasberry & Hulse, which check was

in the amount of \$5,311.08 and which check was subsequently collected after endorsement [105] by Palomas by P. W. Pogson, Vice President, Percy W. Pogson, Jr., Secretary and Treasurer, and Burges, Scott, Rasberry & Hulse by John L. Rasberry, a partner; that a photostat of said check, together with all endorsements thereon, is attached hereto and marked "Exhibit 20."

Affiant further states that in December of 1948 a fifth installment upon said award became available in the amount of \$102,512.20 and a letter requesting the execution of the voucher for such payment was forwarded by the Trustees to John L. Rasberry on December 22, 1948, a photostat of which letter is attached hereto and marked "Exhibit 21;" that on December 27, 1948, said John L. Rasberry, as attorney for Palomas, returned said voucher duly executed by two of its officers and requesting a separate check for 15% of the proceeds available to Palomas to be made jointly payable to Palomas and the firm of Burges, Scott, Rasberry & Hulse; that a copy of said letter of John L. Rasberry was sent to P. W. Pogson, Letha L. Stephenson and Henry T. Moore; that a photostat of said letter is attached hereto and marked "Exhibit 22;" that on February 4, 1949, said fifth installment was received by the Trustees and disbursed to the parties entitled thereto under the terms of said Trust Agreement dated October 29, 1943; that the share payable to Palomas was transmitted by letter dated February 4, 1949, to said John L. Rasberry, a photostat of which letter is

attached hereto and marked "Exhibit 23;" that enclosed in said letter of February 4, 1949, was a check payable to Palomas and Burges, Scott, Rasberry & Hulse in the amount of \$5,665.14, which is 15% of the total amount due said Palomas, which check bears the endorsement of Palomas by P. W. Pogson, Vice President, and Percy W. Pogson, Jr., Secretary and Treasurer, and a further endorsement showing it to be deposited to the account of Burges, Scott, Rasberry & Hulse at the El Paso National Bank; that a photostat of said check, together with all endorsements, is attached hereto and marked "Exhibit 24."

Affiant further says that in December of 1949 a sixth installment upon said claim became available in the amount of \$99,308.70 and a voucher for such payment was sent to John L. Rasberry, as attorney for Palomas, under date of December 29, 1949, **requesting the execution** of said voucher as had been done in the past; that a photostat of said letter is attached hereto and marked "Exhibit 25"; that on January 3, 1950, John L. Rasberry wrote to the Trustees acknowledging receipt of said voucher and requesting a joint check payable to Palomas and his firm in the amount of 15% of the amount due Palomas, a photostat of said letter being attached hereto and marked "Exhibit 26"; that enclosed in said letter of January 3, 1950, was a copy of a letter from John L. Rasberry addressed to Henry T. Moore, which letter referred to the fact that the books and records of Palomas had been delivered to Letha Stephenson Metcalf, the widow of Marshall

B. Stephenson, and who had recently married Jess L. Metcalf, and that P. W. Pogson and Percy W. Pogson, Jr., are no longer officers of Palomas; that this is the first knowledge that the Trustees had of the change in marital status of said Letha Stephenson Metcalf or of the change in officers of Palomas; that the photostat of said letter to Henry T. Moore dated January 3, 1950, is attached hereto and marked "Exhibit 27."

Affiant further states that on January 20, 1950, said Trustees received a letter from Roland Rich Woolley, an attorney-at-law in Los Angeles, California, enclosing said voucher executed by Letha L. Metcalf, as President, and W. J. Clayton, as Secretary of Palomas, and asking of these Trustees certain questions concerning disbursement of the proceeds due Palomas in the past; that a photostat of said letter of January 19, 1950, is attached hereto and marked "Exhibit 28"; that enclosed therein was a letter signed by Letha L. Metcalf, as President, and W. J. Clayton, as Secretary of Palomas, addressed to the Trustees, advising said Trustees that Roland Rich Woolley had the authority to act for and represent said corporation and requesting that all checks and proceeds payable to said Palomas arising out of said award, be paid and delivered to 649 South Olive Street, Los Angeles 14, California, which is the office address of said Roland Rich Woolley, and further advising that any sum to be paid to Burges, Scott, Rasberry & Hulse would be paid by the corporation direct; that a photostat of said letter, dated January 19, 1950, is attached

hereto and marked "Exhibit 29"; that prior to [107] the date of the receipt of said Exhibits 28 and 29 the Trustees had no knowledge of the representation by said Roland Rich Woolley of said Palomas, or that there was any question by said Palomas, or its officers, of the manner in which the Trustees had disbursed the funds from the collection of the first five installments.

Affiant further says that on January 23, 1950, said Trustees received a letter from John L. Rasberry requesting us to disregard the request as contained in said letter of January 19, 1950, and to continue to disburse 15% of the amount due Palomas by a check jointly payable to Palomas and Burges, Scott, Rasberry & Hulse, and to deliver said check to said John L. Rasberry; that a photostat of said letter of January 23, 1950, is attached hereto and marked "Exhibit 30."

Affiant further states that on January 26, 1950, one L. R. Ulrich, in behalf of said Trustees, answered the letter of Roland Rich Woolley of January 19, 1950, a copy of which reply was sent to John L. Rasberry and a photostat of which letter is attached hereto and marked "Exhibit 31."

Affiant further says that on January 31, 1950, the Trustees received a second letter of inquiry from Roland Rich Woolley, a copy of which letter is attached hereto and marked "Exhibit 32"; that on February 6, 1950, one Vernon R. Burt, in behalf of the Trustees, replied to said letter of January 31, 1950; that a photostat of his letter is attached hereto and marked "Exhibit 33"; that the enclosures re-

ferred to in said Exhibit 33 are also attached hereto as Exhibits Nos. 10, 15, 16, 18, 19, 20, 22, 23, 24 and 26.

Affiant further states that on February 6, 1950, the Trustees received a letter from John L. Raspberry formally demanding that the Trustees deliver to the firm of Burges, Scott, Raspberry & Hulse, as assignees of Palomas, the sum of 15% of that portion of the sixth installment payable to Palomas, a photostat of which demand is attached hereto and marked "Exhibit 34."

Affiant further says that on February 13, 1950, the Trustees received a further letter from Roland Rich Woolley asking further questions of them, a photostat of which letter is attached hereto and marked "Exhibit 35"; that on [108] February 17, 1950, said Vernon R. Burt replied, in behalf of said Trustees, to said letter of February 13, 1950, a photostat of said reply being attached hereto and marked "Exhibit 36."

Affiant further says that on March 13, 1950, said Trustees completed the collection of the sixth installment and by a letter dated March 13, 1950, addressed to Palomas at 649 South Olive Street, Los Angeles, 14, California, a photostat of which letter is attached hereto and marked "Exhibit 37," transmitted 85% of the share due Palomas, which share amounted to \$31,099.31, and advised that the balance of 15% would be deposited with the Registry of the District Court of the United States, Southern District of California, Central Division; that thereafter, to wit, on March 30, 1950, your affiant filed

the instant action in this Court naming as parties thereto all persons making claim upon him as the surviving Trustee for the balance of the proceeds held by him from the collection of the sixth installment upon said award.

Further affiant sayeth not.

/s/ ARTHUR D. BALDWIN.

Sworn to Before Me and subscribed in my presence this 16th day of May, 1950.

[Seal] /s/ VERNON R. BURT,
Notary Public.

My commission expires Jan. 3, 1953. [109]

Exhibit No. 1

Agreement

This Agreement made as of the 29th day of October, 1943, by and between Palomas Land and Cattle Company, a California corporation, as Party of the First Part, hereinafter called "Palomas," Security-First National Bank of Los Angeles, a National Banking Association, as Party of the Second Part, hereinafter called "Bank," and James R. Garfield, Arthur D. Baldwin and Clare M. Vrooman, of Cleveland, Ohio, individually and as partners engaged in the practice of law under the firm name of Garfield, Baldwin & Vrooman, collectively as Party of the Third Part, hereinafter for convenience sometimes referred to as "Trustees,"

Witnesseth, that Whereas:

1. Under date of August 26, 1943, pursuant to the provisions of the Settlement of Mexican Claims Act of 1942, the American Mexican Claims Commission entered an award in favor of Palomas in the amount of \$1,686,056, and certified such award to the Secretary of the Treasury for payment to Palomas in accordance with the provisions of said Act of 1942, said award having been made on that certain claim of Palomas theretofore pending before the General Claims Commission of the United States of America and United Mexican States under Docket No. 2067 of that Commission;

2. The parties to this agreement assert conflicting claims to said award; the conflicting claims of Palomas and Bank are now the subject of that certain action in the District Court of the United States for the District of Columbia, entitled: "Security-First National Bank of Los Angeles, etc., Plaintiff, vs. Palomas Land and Cattle Company, etc., et al., Defendants," designated as Civil Action No. 21295 on the records of said Court. [110]

3. The parties hereto are desirous of resolving their conflicting claims to said award and of compromising and settling all differences among them in the manner hereinafter set forth;

Now, Therefore, in consideration of the premises and the respective undertakings on the part of the parties hereto, as hereinafter set forth, it is hereby agreed as follows:

I.

Palomas and Bank shall, and do hereby, assign, transfer and set over unto the Trustees all of their respective rights, titles and interests in and to said award (including all sums paid or payable on said award), in trust nevertheless, and the Trustees shall, and hereby covenant and agree to, hold the same, together with all their rights, titles and interests in and to said award (including all sums paid or payable on said award), in trust for the following purposes:

(a) To collect, receive and receipt for all sums paid or payable on said award and the Trustees shall have full power so to do;

(b) To promptly, upon receipt of any sums paid or payable on account of said award, disburse the same as follows:

A seven-nineteenths (7/19ths) part to Palomas;

A seven-nineteenths (7/19ths) part to Bank;

The remaining five-nineteenths (5/19ths) part to Garfield, Baldwin & Vrooman, (the Trustees). Pending actual disbursement of said funds by the Trustees, as above provided, the Trustee shall maintain the same in a trust account with the Cleveland Trust Company of Cleveland, Ohio, or with some other responsible bank or trust company. The Trustees shall execute this trust without charge. No expenses shall be incurred without first obtaining the written approval of Palomas and Bank. The Trustees shall not make or permit any substitution

under any power of attorney heretofore or hereafter given them to [111] enable them to effect collection of sums payable on said award without first causing the substitute to execute an undertaking to hold all funds coming to his hands in trust for the purposes and on the terms and conditions herein set forth.

II.

Each party to this agreement shall, and does hereby, release and forever discharge each other party to this agreement, and Bank, in addition, shall and does hereby release and forever discharge Hueco Cattle Company, a Texas corporation, and Marshall B. Stephenson and each of them of and from all claims, demands, actions and causes of action of whatsoever character, now existing or hereafter arising and based upon any contract, agreement, instrument, transaction, matter, happening or thing of whatsoever nature to the date hereof, except claims, demands, actions or causes of action based upon this agreement.

III.

Each party hereto on the demand of any other party hereto shall execute and deliver such further instrument or instruments as may be necessary or convenient to enable the Trustees to collect any sums paid or payable on account of said award and to disburse the same as hereinabove set forth, or to otherwise effectuate the purposes of this agreement.

IV.

In the event that all sums paid or payable on the aforesaid award shall not have been sooner collected and disbursed by the Trustees, as provided in Paragraph I hereof, the trust created in and by said Paragraph I shall terminate on the 28th day of October, 1964, and thereupon any funds in the hands of the Trustees collected on said award shall be forthwith disbursed in accordance with the provisions of Paragraph I hereof, and said award (to the extent of and including any sums unpaid on account thereof) shall be disposed of by the Trustees in such manner as the parties hereto may agree upon in writing, and failing such agreement, then the Trustees shall distribute said award (to the extent [112] of and including any sums unpaid on account thereof), discharged of any trust, as follows:

An undivided seven-nineteenths (7/19ths) part to Palomas;

An undivided seven-nineteenths (7/19ths) part to Bank;

The remaining undivided five-nineteenths (5/19ths) part to Garfield, Baldwin & Vrooman, (the Trustees).

V.

Palomas, within thirty (30) days from the date hereof, shall cause to be executed, and shall deliver to Bank, a good and sufficient instrument or instruments wherein and whereby Palomas and its President, Marshall B. Stephenson, and each of them,

release and forever discharge Compania Palomas de Terrenos y Ganado, S. A., a Mexican corporation, hereinafter called "Compania Palomas," Nacional Ganadera, S.A. de C.V., a Mexican corporation, hereinafter called "Nacional Ganadera," Ben F. Williams, A. J. Kalin, W. C. Greene, F. A. Villalobos, Charles E. Wiswall and Alfonso Morales, and each of them, of and from all claims, demands, actions and causes of action of whatsoever character, now existing or hereafter arising and based upon any contract, agreement, instrument, transaction, matter, happening or thing of whatsoever nature to the date hereof.

VI.

Bank, within thirty (30) days from the date hereof, shall cause to be executed, and shall deliver to Palomas, a good and sufficient instrument or instruments wherein and whereby Compania Palomas, Nacional Ganadera, said Ben F. Williams, A. J. Kalin, W. C. Greene, F. A. Villalobos, Charles E. Wiswall and Alfonso Morales, and each of them, release and forever discharge Palomas, said Marshall B. Stephenson and Hueco Cattle Company, a Texas corporation, and each of them, of and from all claims. [113] demands, actions and causes of action of whatsoever character, now existing or hereafter arising and based upon any contract, agreement, instrument, transaction, matter, happening or thing of whatsoever nature to the date hereof.

VII.

Any notice which any party may desire to give to any other party may be given by United States registered mail addressed to Palomas at 1100 First National Bank Building, El Paso, Texas, to Bank at its Head Office, Sixth and Spring Streets, Los Angeles, California, and to the Trustees at 1401 Midland Building, Cleveland, Ohio, subject to the right of any party to designate for itself a different address by notice similarly given.

In Witness Whereof, the parties hereto have executed this agreement as of the day and year first above written.

PALOMAS LAND AND
CATTLE COMPANY,

[Corporate Seal.]

By /s/ MARSHALL B. STEPHENSON,
President.

By /s/ SADIE BROWN,
Secretary.

Party of the First Part
and "Palomas."

SECURITY-FIRST NATIONAL
BANK OF LOS ANGELES,

[Corporate Seal.]

By /s/ ROBT. J. SEVITZ,
Vice President.

By /s/ RANDALL BOYD,
Asst. Sec.

Party of the Second Part
and "Bank."

/s/ JAMES R. GARFIELD.

/s/ ARTHUR D. BALDWIN.

/s/ CLARE M. VROOMAN.

GARFIELD, BALDWIN &
VROOMAN,

By /s/ JAMES R. GARFIELD,

Collectively Party of the
Third Part and "Trustees."

Exhibit No. 2

May 15, 1941

Mr. James R. Garfield,
Garfield, Cross, Daoust, Baldwin and Vrooman,
Midland Building,
Cleveland, Ohio.

Dear Mr. Garfield:

We beg to acknowledge receipt of your letter of April 24, 1941, and as we have previously advised, we definitely understood from Mr. Minchen that your firm had withdrawn from the handling of all matters in connection with the title to the Cia. Palomas properties in Mexico, including the handling of the general claim through the State Department in Washington. Insofar as we know, Mr. Minchen had been up to the time of his withdrawal handling the matter for your firm and was fully authorized to act for you. We, of course, presumed that he kept you fully informed of the situation, and when he stated there were no fees due, we understood that he was speaking not only for him-

self, but for his firm, as he undoubtedly had a right to do. From our viewpoint, there was, of course, nothing left for us to do but to proceed with the employment of other counsel, which we did, and they have been looking after the entire matter since that date.

As stated, we construed Mr. Minchen's withdrawal to be a complete withdrawal from the handling of any matters in connection with the titles of the Cia. Palomas in Mexico; including the prosecution of any so-called general claim, and we have acted on such construction, as we feel we had a right to do. Therefore, we think nothing should be done by you toward the prosecution of such general claim through the State Department, but the matter should be allowed to rest just as it is, so that our rights may not be jeopardized, for as stated the litigation begun upon Mr. Minchen's withdrawal is being now prosecuted in Mexico with the end in view of validating these titles.

Under the circumstances, we feel that the statement, submitted to us with the voucher covering the fourth installment on the special Mexican claims is out of line. Should you still feel that such statement should be paid we suggest that you furnish us with complete statement, itemized in detail as to dates and time spent in trips to Washington and Mexico City, as well as any incidental expenses which may have been covered by the statement rendered, limiting such statement to any time spent or expenses incurred prior to date of August 1, 1940.

Please let us hear from you at your earliest convenience.

Yours very truly,

PALOMAS LAND AND
CATTLE COMPANY,

By

Exhibit No. 3

Garfield, Cross, Daoust, Baldwin & Vrooman

Midland Building
Cleveland

May 21, 1941

Marshall B. Stephenson, Vice President,
Palomas Land and Cattle Company,

215 West Sixth Street,
Los Angeles, California.

Dear Mr. Stephenson:

Because Mr. Minchen and I were doing all possible to forestall the proceedings of the Mexican Government in the despoilation of the Palomas Ranch in Mexico, and because I was not cognizant that dissension was brewing, I was, apparently, not alert to the real situation in connection with this matter. However, in studying the file today, it appears that, as early as March, 1940, when all documents were ordered by H. S. Stephenson to be sent to El Paso National Bank, steps had been taken to discontinue my services, although, as stated above,

I did not then view the matter in the same light as a retrospective examination of the file now reveals.

No advice came from you that my services were discontinued, and because I was unaware of dissatisfaction on your part, I proceeded to handle the matter in the same spirit of friendship and helpfulness as I had pursued in the past, taking what steps I felt were desirable to insure for the protection of the Palomas Ranch.

I became disturbed about the relationship between the company and our office after Mr. Minchen wrote to Mr. Villalobos on August 1, 1940, telling him that because of complete lack of cooperation and a disregard of all of Mr. Minchen's suggestions and recommendations, Mr. Minchen would be unable to assume further responsibility in the matter. I then wrote to you on August 23, 1940, indicating that if you had decided that my services were no longer required, you should have so informed me. I asked at that time to be advised regarding the matter. As you know, I received your reply on September 30, 1940, but even at that time, it was difficult for me to feel that Mr. H. S. Stephenson, with whom I had had most of my dealings, was aware of the situation. Perhaps I was mistaken in my interpretation of the actions taken.

While Mr. Minchen's letter of August 1, 1940, states that he had no claim to place for his time and expense incurred subsequent to March, 1940, I feel that my services during the period February 1, 1940, to at least August 1, 1940, are unquestionably

a proper charge. I have, as you requested, detailed the services performed by me during that period. On my trips to Washington and Mexico City, I have shown only the actual time consumed in conferences and have not attempted to bill you for any part of my travel time. Also, in order to keep the travel expenses to a minimum, I have always attempted to arrange the Washington conferences at a time when other professional engagements took me to that vicinity. At this time, I have no additional expenses assessable to the Palomas Company.

Mr. Minchen's withdrawal of his services in the despoilation matter in no respect affects the terms outlined in the additional contract executed by the Palomas Land and Cattle Company on December 14, 1935, covering the Special and General Mexican Claims. As you are aware, many years of effort are represented in those claims, all of which work was done on a contingent basis, as covered by your contract with us. You will, of course, be expected to settle those claims on the agreed percentage basis. At the present time, the company has in its possession the voucher covering the fourth installment on the Special Claim. If the present schedule holds, payments will be made each year until the award is consummated. On the General Claims:—I reported to you recently that there now appears to be a possibility of the two Governments' effecting lump sum settlement.

Although your letter was sent to me from El Paso, I have assumed that you wish me to address you at the company's office, and I am, therefore,

sending this letter to the Los Angeles office, with a copy to you at Columbus, New Mexico.

Sincerely yours,

/s/ JAMES R. GARFIELD.

JRG:mb

Exhibit No. 4

June 24, 1941.

Palomas Land and Cattle Company,
El Paso, Texas.

Attention: Mr. Marshall B. Stephenson.

Gentlemen:

As a result of our conference today regarding the Palomas Land and Cattle Company situation, we have agreed to settle the outstanding account of our office, dated May 21, 1941, rendered to the Palomas Land and Cattle Company for \$500.00.

As to future work, I am to consider the question of whether or not the Palomas Land and Cattle Company has a claim that can be presented to the Agrarian Commission covering the loss that has resulted from the sale of the stock of the Compania Palomas to the new holders at a figure of One Million Dollars. I will examine in Washington the files of the Palomas Land and Cattle Company General Claim and such other instruments as may be available and determine whether or not we have for the Palomas Land and Cattle Company a basis for the presentation of a claim under the existing Ag-

rarian Commission. There should be included in this claim, if possible, the loss sustained by the Palomas Land and Cattle Company by reason of the cloud upon its titles and the inability to dispose of its property at a figure commensuate with its real value. In addition thereto, there should be included in that claim any items of legal or other expenses which can be properly charged in the claim if presented. It has been my feeling that the limitation of the period of 1927 may not prevent the presentation of this claim for the reason that the cloud upon the titles was a continuing one and was evidenced by the action of the Mexican Government in January, 1940, seeking to declare a nullity of titles on the basis of the Obregon Decree and on the further claim that the titles since 1890 were subject to attack.

The settlement mentioned in the first paragraph of this letter includes everything pending at this time including the prosecution of any claims before the State Department or otherwise, but excepting the Special Claim upon which judgment has been rendered and in which we have a contingent interest.

It is understood that no further action will be taken with reference to the confirmation of titles and that in the prosecution of any claim before the Agrarian Commission no claim will be presented for lands which have been actually taken possession of by the agrarians, it being understood that the present owners of the Compania Palomas stock intend undertaking to confirm the titles to these lands.

In the prosecution of the Agrarian Claim, our compensation will be wholly contingent on the basis

of $33\frac{1}{3}\%$ of recovery. As to expenses, I will give you an estimate of what those expenses would be by the month and year, and you are to advise me what can be done by you regarding the payment of those expenses and if I conclude that you do have a valid claim which can be so presented and we ultimately enter into agreement concerning it, you will be advised first concerning any expenses in connection therewith.

At the present time, the General Claim filed before the Original Claims Commission is in suspense. It is assumed that the presentation of the new claim before the Agrarian Claims Commission will take the place of the General Claim. In the event nothing can be done before the Agrarian Commission, the agreement now subsisting regarding presentation of the General Claim will continue, except, however, no expenses will be incurred by our office in connection therewith except upon your prior approval and the prosecution of such General Claim to the extent of confirming titles is waived.

Yours very truly,

JRG:mb

Two ccs to Mr. Rasberry.

[Marginal Note]: This letter dictated by Messrs. Rasberry, Stephenson & J. R. Garfield.

COPY

GARFIELD, BALDWIN & VROOMAN

99

December 17, 1943

L. Raspberry, Esq.,
Borges, Burges, Scott, Raspberry & Hulse,
First National Building,
Paso, Texas.

Dear Jack:

Re: Security vs Palomas

In accordance with our long distance telephone
call late today, the Government check cleared this af-
ternoon and I am therefore enclosing check payable to
Palomas Land and Cattle Company in the sum of \$177,035.88.

With best wishes, I am

Sincerely yours,

V:IM
cl.

*See Mr. Raspberry of
letter of
1/10/44
acknowledged
that check
has been
paid
which
read
Mr.
approves
at that
time*

Palomas Land and Cattle Co

By: *Maxfield H. Vrooman* President



PAY TO THE ORDER OF
ANY BANK OREROR IN TRUST CO.
ALL OTHER COUNTRIES BEING UNDESIRABLE
88-15 DEC 21 1943 88-15
R. PASO NATIONAL BANK
EL PASO TEXAS

PAY TO THE ORDER OF
ANY BANK OREROR IN TRUST CO.
ALL OTHER COUNTRIES BEING UNDESIRABLE
8-1

Garfield, Baldwin & Vrooman

NUMBER 4098

CLEVELAND, O. December 17, 19 43

.....PALOMAS LAND AND CATTLE COMPANY.....

\$ 177,035.88

ONE HUNDRED, SEVENTY-SEVEN THOUSAND, THIRTY-FIVE AND 88/100..... DOLLARS

The
Cleveland Trust Company

Garfield, Baldwin & Vrooman, Trustees

TERMINAL OFFICE



Exhibit No. 7

Burges, Burges, Scott, Rasberry & Hulse
Attorneys and Counsellors at Law
First National Bank Building
El Paso, Texas

January 10, 1944.

Mr. Clare M. Vrooman,
1401 Midland Building,
Cleveland 15, Ohio.

Dear Clare:

I don't know whether I have acknowledged receipt of the Palomas check or not, but in any event it came as quite a Christmas present to both Marshall and our firm, and we appreciate the promptness with which the funds were disbursed. In this connection, I'd like to have you make the checks payable in the future to both the Palomas Land and Cattle Company and our firm as we have a contingent interest in the proceeds. Incidentally, have you any information as to when the next payment will be made.

I also want to thank you for the Christmas verse. I assume it is original and accordingly I want to compliment you on its wealth of thought and expression and its particular appropriateness at this time. I have pasted it away in my scrap book for future reference.

Let me wish for you and Mr. Garfield a prosperous and happy New Year.

Sincerely yours,

/s/ J. L. RASBERRY.

TLR/b.

Exhibit No. 8

October 25, 1945.

Mr. J. L. Rasberry,
Burges, Scott, Rasberry & Hulse,
First National Bank,
El Paso, Texas.

In re: Palomas Land and Cattle Company
General Mexican Claim

Dear Mr. Rasberry:

There is enclosed check in the amount of \$59,-
011.96, payable to the Palomas Land and Cattle
Company and your firm, representing the share ap-
plicable to the Palomas Land and Cattle Company
of the second installment on the General Claim.

For your information, I am giving the following
details:

- | | |
|---|-----------------|
| 1. Total award made by the Govern-
ment | \$1,686,056.00 |
| 2. Second installment, based on 10%
of the award..... | \$ 168,605.60 |
| 3. Less 5% charge made by the Gov-
ernment | <u>8,430.28</u> |
| 4. Net Payment by the Government on
second installment | 160,175.32 |
| 5. Distribution of net funds: | |
| 7/19 to Security First
National Bank of Los
Angeles | \$59,011.96 |

7/19 to cover Palomas
Land and Cattle Com-
pany's share 59,011.96
5/19 to this firm..... 42,151.40

160,175.32

Sincerely yours,

.....,
JAMES R. GARFIELD.

JRG:mb

cc to Mr. MM

*Palmer & Co. Cash
 P.O. Box 1000
 St. Louis, Mo.
 For Garfield, Hope & Ulrich
 Attorneys*

OCT 30 1945
 EL PASO NATIONAL BANK
 EL PASO, TEXAS
 88 151
 33-15

FEDERAL RESERVE BANK OF CLEVELAND
 CLEVELAND, OHIO
 OCT 30 1945
 PAY TO THE ORDER OF

No. **433**
 October 25 1945
 CLEVELAND, OHIO
 PAY TO THE ORDER OF
 POLYMER LAM AND CATTLE COMPANY AND PURGES, SCOTT, PASBERRY & HULSE, ITS ATTORNEYS.
 \$ 59,011.96
 DOLLARS

Garfield, Baldwin, Jamison, Hope & Ulrich, Trustees

THE NATIONAL CITY BANK
 OF CLEVELAND

Garfield, Baldwin, Jamison, Hope & Ulrich, Trustees



Exhibit No. 10

Burges, Scott, Rasberry & Hulse
Attorneys and Counsellors at Law
First National Bank Building
El Paso, Texas

May 31, 1947

Mr. James R. Garfield,
Garfield, Baldwin, Jamison, Hope & Ulrich,
1425 Guardian Building,
Cleveland 14, Ohio.

In re: Palomas Land and Cattle Company
General Mexican Claim.

Dear Mr. Garfield:

I received in due time your letter of May 26, 1947, enclosing Voucher (Form 406 Treasury Department) covering the third installment on the Palomas General Mexican Claim of 6.5%, the net proceeds of which appear to be \$104,113.96. Since Marshall's death, his widow, Letha L. Stephenson, who now lives in California, has been President of the company. However, P. W. Pogson is Vice-President and Percy W. Pogson, Jr., is Secretary-Treasurer. We were therefore able to complete the voucher at El Paso and now enclose the same to you herewith duly executed.

As you know, our firm is entitled to 15% of the proceeds due Palomas Land and Cattle Company as attorney's fees. Accordingly, for convenience, we respectfully request that in disbursing the amount due Palomas Land and Cattle Company you

make two checks, one for 15% of the amount, payable to this firm, and one for the balance payable to Palomas Land and Cattle Company.

With kind personal regards and best wishes, beg to remain

Yours sincerely,

/s/ J. L. RASBERRY,
J. L. RASBERRY.

JLR/vb

Encls.

cc: Mr. P. W. Pogson, Jr.

Mrs. Letha L. Stephenson

Exhibit No. 11

Burges, Scott, Rasberry & Hulse
Attorneys and Counsellors at Law

First National Bank Building
El Paso, Texas

May 31, 1947

Confidential

Mr. James R. Garfield,

Garfield, Baldwin, Jamison, Hope & Ulrich,

1425 Guardian Building,

Cleveland 14, Ohio.

Dear Mr. Garfield:

You will note my request in the attached letter that you divide the portion to which Palomas is entitled into two parts, one for our attorney's fee

of 15% and the other for the balance. We have no objection to the check evidencing our attorney's fees being payable to Palomas Land and Cattle Company as joint payee, but we do desire our firm named as a payee therein. In support thereof, we attach hereto photostat copy of our contract with Palomas Land and Cattle Company for your records and so that you, as Trustee, are advised of our interest in the portion belonging to Palomas Land and Cattle Company. We do not anticipate any argument about the matter for our portion thereof was paid without question during Marshall's lifetime. However, Marshall is dead and something may happen to me. Therefore, I want to get this set up so that there is a record thereof on file with you and so that our attorney's fees can be segregated by the Trustees.

My wife and I plan to attend the meeting of the American Bar Association in Cleveland in September of this year and we are looking forward to seeing you at this time.

With kind personal regards and best wishes, beg to remain

Yours sincerely,

/s/ J. L. RASBERRY,
J. L. RASBERRY.

JLR/vb

Encl.

Exhibit No. 12

August 6, 1943.

Burges, Burges, Scott, Rasberry & Hulse,
El Paso, Texas.

Confirming our verbal agreement, the undersigned hereby employs you to prosecute and assert the claims of undersigned to any award made to undersigned under the provisions of the convention between the United States of America and Mexico, dated November 19, 1941, and Public Law 814 adopted by the 77th Congress of the United States, and to defend any claims asserted to any such award by Ben Williams, et al., and the Security-First National Bank of Los Angeles. Undersigned agrees to pay you for any services rendered in this connection as follows:

1. Should the matters in controversy be settled by agreement prior to the filing of any suit by undersigned or the parties named, you shall receive 5% of any sums realized by undersigned or either of them.

2. Should the matters in controversy be disposed of by litigation or settled by agreement after the filing of any suit or legal procedure by undersigned or the other claimants mentioned, you shall receive 15% of all sums realized by undersigned or either of them.

3. It is understood that in arriving at your fee, any sum deducted from the award by the law firm of Garfield, Baldwin & Vrooman or ultimately

allowed them for the prosecution of such claims before the Mexican Claims Commission shall not be taken into consideration in arriving at the sums realized by undersigned.

4. It is also understood that undersigned shall pay all expenses incurred by you in the handling of this matter, including traveling expenses, telephone and telegraph bills, etc., and the fees of any out of state attorney or attorneys whom you may deem it necessary to employ for the purpose of prosecuting or defending any litigation instituted outside of the State of Texas to protect the undersigned.

Yours very truly,

PALOMAS LAND AND CAT-
TLE COMPANY,

By /s/ MARSHALL B. STEPHENSON,
President.

HUECO CATTLE COMPANY,

By /s/ MARSHALL B. STEPHENSON,
President.

Approved:

BURGES, BURGES, SCOTT,
RASBERRY & HULSE,

By /s/ J. L. RASBERRY.

Exhibit No. 13

June 3, 1947.

Air Mail—Special Delivery

Mr. J. L. Rasberry,
Burges, Scott, Rasberry & Hulse,
First National Bank Bldg.,
El Paso, Texas.

In re: Palomas Land and Cattle Company
General Mexican Claim.

Dear Mr. Rasberry:

This morning's mail brought to me a copy of your letter of May 31, 1947, addressed to me. Apparently, the original has been misrouted, as it has not come to me. With the original, no doubt, is the voucher to which you refer.

Relative to the disbursement of the proceeds of the voucher: You will recall that the distribution of the funds is to be made in accordance with the terms of the contract of October 29, 1943, by and between Palomas Land and Cattle Company, Security-First National Bank of Los Angeles, and the partnership of Garfield, Baldwin & Vrooman.

Perhaps by the time you receive this letter, you will have discovered the error, and will have sent me the voucher with the original letter.

With all good wishes,

Sincerely yours,

.....

JRG:mb

Exhibit No. 14

Burges, Scott, Rasberry & Hulse
Attorneys and Counsellors at Law
First National Bank Building
El Paso, Texas

June 4th, 1947

Airmail

Mr. James R. Garfield,
Garfield, Baldwin, Jamison, Hope & Ulrich,
1425 Guardian Building,
Cleveland 14, Ohio

Re: Palomas Land and Cattle Company
General Mexican Claim

Dear Mr. Garfield:

Received this morning your letter of June 3, 1947, with reference to the above matter. I sent to you the copy by airmail simply so that you would know the matter had been promptly attend to. Original of the letter and the voucher went forward to you on the same date by regular mail. I am sorry I confused you by overlooking to show that original letter and voucher followed by regular mail.

I do, of course, recall that the distribution of the funds is to be made in accordance with the terms of the contract of October 29, 1943. However, my confidential letter accompanying the voucher will explain our position and of course so long as Palomas Land and Cattle Company is joint payee in the check evidencing our attorneys' fees you are

taking no responsibility for the matter. In any event, we will appreciate your handling the matter in the manner suggested.

If you have not received the voucher by the time you receive this letter, advise me, and I will undertake to trace the original letter and voucher.

With kind personal regards and best wishes, beg to remain,

Yours sincerely,

/s/ J. L. RASBERRY,
J. L. RASBERRY.

JLR/ea

Exhibit No. 15

July 1, 1947.

Mr. J. L. Rasberry,
Burges, Scott, Rasberry & Hulse,
First National Bank Bldg.,
El Paso, Texas.

In re: Palomas Land and Cattle Company
General Mexican Claim:

Dear Mr. Rasberry:

The check covering the third installment on the General Claim has just been received, in the amount of \$104,113.96. Distribution thereof is being made as indicated below:

1. Total amount of the award in this case is.....	\$1,686,056.00
2. The third installment, based on 6.5% of the award would figure	\$ 109,593.64
3. Less 5% charge made by the government.....	5,479.68

4. Net payment by government on third installment			\$ 104,113.96
5. Distribution of net funds:			
7/19 to Security First National Bank of Los Angeles		\$38,357.77	
7/19 available for Palomas Land and Cattle Company's share:			
15% issued to the Company and your firm, its attorneys		\$ 5,753.66	
85% to the Company	32,604.11	38,357.77	
5/19 to this firm	27,398.42		
			<u>\$ 104,113.96</u>

The two checks, representing the Palomas Land and Cattle Company's share, are enclosed, and I trust that the manner of issuance will meet your requirements. Since the Vice President and Secretary-Treasurer signed the voucher, it might be desirable to ask that the endorsement of the check by the Palomas Land and Cattle Company carry the signatures of both of those officers on the check which has been made payable to your firm and Palomas. If you see any objection to such procedure, I shall be glad to hear from you regarding it. I am acting in Mr. Garfield's absence, and, of course, wish to do all that is necessary to insure for the disposition of the funds in accordance with the Agreement.

Mr. Garfield and I are happy to cooperate with you in this matter.

Yours very truly,

.....,
A. D. BALDWIN.

AJB:mb

cc to Mr. MM

PALOMAS LAND AND CATTLE CO.

By: [Signature]
Vice-President

Attest: [Signature]
Secretary and Treasurer

BURGES, SCOTT, RASBERRY & HULSE

By: [Signature]
Its Attorneys.

PAY TO THE ORDER OF
El Paso National Bank
FOR DEPOSIT ONLY
BURGES, SCOTT, RASBERRY & HULSE
1463

GARFIELD, BALDWIN, JAMISON, HOPE & ULRICH.

CLEVELAND, OHIO

July 1

1947

No. 757

PAY TO THE ORDER OF

PALOMAS LAND AND CATTLE COMPANY, INC.
BURGES, SCOTT, RASBERRY & HULSE, ITS ATTORNEYS.

\$ 5753.66

DOLLARS

Garfield, Baldwin, Jamison, Hope & Ulrich, Trustees

Paid to National City Bank

Exhibit No. 17

January 22, 1948.

Mr. J. L. Rasberry,
Borges, Scott, Rasberry & Hulse,
First National Bank Bldg.,
El Paso, Texas.

In re: Palomas Land and Cattle Company
General Mexican Claim.

Dear Mr. Rasberry:

There is enclosed Form 406 of the Treasury Department, covering the fourth installment on the Palomas General Mexican Claim. The net proceeds available at this time, as shown by the voucher, will be \$96,105.19.

The procedure to be followed in executing the voucher and various affidavits is similar to that established on previous installments.

I am sending a copy of this letter to Mr. Coffin and a copy to Mr. Belcher, so that they may be informed of the issuance of the voucher covering this installment, which is figured at 6% (less the Government's charge of 5%).

When the papers have been executed, will you please have them come to me, and I shall follow the

matter through with the Department at Washington.

With all good wishes,

Sincerely yours,

/s/ JAMES R. GARFIELD,
JAMES R. GARFIELD.

JRG:mb

cc: to Mr. MM

to Mr. Coffin, Lawler, Felix & Hall, Los Angeles, California.

to Mr. Belcher, c/o Jennings & Belcher, Los Angeles, California.

Exhibit No. 18

Burges, Scott, Rasberry & Hulse
Attorneys and Counsellors at Law
First National Bank Building
El Paso, Texas

January 24, 1948

Air Mail

Mr. James R. Garfield,
Garfield, Baldwin, Jamison, Hope & Ulrich,
1425 Guardian Building,
Cleveland 14, Ohio.

In re: Palomas Land and Cattle Company
General Mexican Claim.

Dear Mr. Garfield:

I received today your letter of January 22, 1948, enclosing voucher (Form 406 Treasury Department)

covering the fourth installment of 6% on the Palomas General Mexican Claim, the net proceeds of which appear to be \$96,105.19. As you know, Mrs. Letha L. Stephenson, who lives in California, is president of the company. However, P. W. Pogson is vice-president and Percy W. Pogson, Jr., is secretary and treasurer. We were therefore able to complete the voucher at El Paso and now enclose the same to you herewith duly executed. As you know, our firm is entitled to 15% of the proceeds due Palomas Land and Cattle Company as attorneys' fees. Accordingly, for convenience, we respectfully request that in disbursing the amount due Palomas Land and Cattle Company you make two checks, one for 15% of the amount, payable to this firm and the Palomas Land and Cattle Company, and one for the balance payable to the Palomas Land and Cattle Company.

With kind personal regards and best wishes, beg to remain

Yours sincerely,

/s/ J. L. RASBERRY,
J. L. RASBERRY.

JLR:vb

Encl.

cc: Mrs. Letha L. Stephenson

Mr. P. W. Pogson, Jr.

Mr. Henry T. Moore [136]

Exhibit No. 19

March 4, 1948.

Mr. J. L. Rasberry,
 Burges, Scott, Rasberry & Hulse,
 First National Bank Bldg.,
 El Paso, Texas.

In re: Palomas Land and Cattle Company
 General Mexican Claim:

Dear Mr. Rasberry:

The check covering the fourth installment on the General Claim has just been received, in the amount of \$96,105.19. Distribution thereof is being made as indicated below:

1. Total amount of the award in this case is.....	\$1,686,056.00
2. The current installment, based on 6% of the award would figure	\$ 101,163.36
3. The charge made by the Government— 5% thereof	5,058.17
4. Net payment by Government on this installment..	\$ 96,105.19
5. Distribution of net funds:	
7/19 to Security First National Bank of Los Angeles	\$35,407.17
7/19 available for Palomas Land and Cattle Company's share:	
15% issued to Com- pany and your firm, its attorneys	\$ 5,311.08
85% to the Company	30,096.09
	<hr/>
	35,407.17
5/19 to this firm	25,290.85
	<hr/>
	\$ 96,105.19

The two checks, representing the Palomas Land and Cattle Company's share, are enclosed, and I trust that the manner of issuance will meet with

your requirements. Since the Vice President and Secretary-Treasurer signed the voucher, it might be advisable to have the endorsement of the check by Palomas Land and Cattle Company carry the signatures of both of those officers on the check which has been made payable to your firm and Palomas.

With all good wishes,

Sincerely yours,

.....,
JAMES R. GARFIELD.

JRG:mb

cc to Mr. MM

Exhibit No. 21

December 22, 1948.

Mr. J. Rasberry,
Burgess, Scott, Rasberry & Hulse,
Attorneys and Counsellors at Law,
First National Building,
El Paso, Texas.

In re: Palomas Land and Cattle Co.
General Mexican Claim

Dear Mr. Rasberry:

Herewith Voucher for Payment of Awards from the Treasury Department, covering the fifth installment on the Palomas General Mexican Claim. The net proceeds available on this installment, as shown by the voucher, will be \$102,512.20 (represents a 6.4% payment).

The procedure to be followed in executing the voucher and various affidavits is similar to that established on previous installments.

A copy of this letter is going to Mr. Coffin, Mr. Belcher, and Mr. Sevitz, so that they may be informed of the issuance of the voucher.

When the papers have been executed, will you please have them come to me, and I shall follow the matter through in the usual way.

With all good wishes for your happiness in the New Year,

Sincerely yours,

.....
JAMES R. GARFIELD.

cc to Mr. Wm. T. Coffin, Lawler, Felix & Hall,
Standard Oil Bldg., Los Angeles 5, Cali-
fornia.

to Mr. Belcher, c/o Jennings & Belcher, Secur-
ity Bldg., Fifth and Spring Sts., Los An-
geles 13, California.

to Mr. Robt. J. Sevitz, Security-First National
Bank of Los Angeles, Los Angeles 24, Cal.

Exhibit No. 22

Burges, Scott, Rasberry & Hulse
Attorneys and Counsellors at Law
First National Building
El Paso, Texas

December 27, 1948

Air Mail

Mr. James R. Garfield,
Garfield, Baldwin, Jamison, Hope & Ulrich,
1425 Guardian Building,
Cleveland 14, Ohio.

In re: Palomas Land and Cattle Co.
General Mexican Claim

Dear Mr. Garfield:

I received today your letter of December 22, 1948, enclosing voucher (Form 406, Treasury Department) covering the fifth installment of 6.4% on the Palomas General Mexican Claim, the net proceeds of which appear to be \$102,512.20. As

you know, Mrs. Letha L. Stephenson, who lives in California, is president of the company. However, P. W. Pogson is Vice-President and Percy W. Pogson, Jr., is Secretary-Treasurer. We were therefore able to complete the voucher at El Paso and now enclose the same to you herewith, duly executed. As you know, our firm is entitled to 15% of the proceeds due Palomas Land and Cattle Company as attorneys' fees. Accordingly, for convenience, we respectfully request that in disbursing the amount due Paloma Land and Cattle Company you make two checks, one for 15% of the amount, payable to this firm and the Palomas Land and Cattle Company, and one for the balance payable to Palomas Land and Cattle Company.

With kind personal regards and best wishes, beg to remain

Yours sincerely,

/s/ J. L. RASBERRY,
J. L. RASBERRY.

JLR:vb

Encls.

cc: Regular Mail

Mr. P. W. Pogson, Jr.

Mrs. Letha L. Stephenson

Mr. Henry T. Moore [144]

Exhibit No. 23

February 4, 1949. (11)

Mr. J. L. Raspberry,
 Burges, Scott, Rasperr. & Hulse,
 First National Bank Bldg.,
 El Paso, Texas.

3 In re: Palomas Land Cattle Company
General Mexican Claim.

Dear Mr. Raspberry:

The check covering the fifth installment on the General Claim is being deposited today, in the amount of \$102,512.20. Distribution thereof is being made as indicated below:

1. Total amount of the award in this case is \$1,686,056.00
2. The current installment, based on 6.4% of
 the award would figure.....\$ 107,907.58
3. The charge made by the Government - 5% thereof 5,395.38
4. Net payment by Government on this installment
\$102,512.20

7/19 to Security First National
 Bank of Los Angeles..... \$ 37,767.65

7/19 available for Palomas Land
 and Cattle Company's share:
 15% issued to Company and
 your firm, its attorneys, be-
 ing.....\$5665.14
 85% to the Company...32102.51

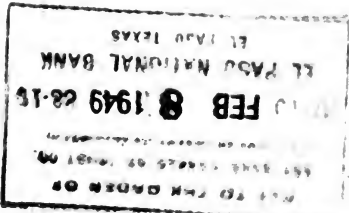
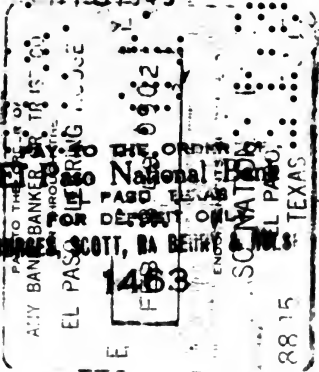
5/19 to this firm..... 26,976.90
\$102,512.20

PALOMAS LAND AND CATTLE COMPANY

By:

Vice President

Secretary-Treasurer



GARFIELD, BALDWIN, JAMISON, HOPE & ULRICH:

No. 1046

CLEVELAND, OHIO February 4, 1949

.....PALOMAS LAND AND CATTLE COMPANY AND SUCCESSORS,
SCOTT, KASBERNER & HULSE, ITS ATTORNEYS.....

\$ 5665.14

DOLLARS

Garfield, Baldwin, Jamison, Hope & Ulrich, Trustees

THIS NATIONAL CATTLE COMPANY

Exhibit No. 25

December 29, 1949.

Registered Mail

Mr. J. L. Rasberry,
Burgess, Scott, Rasberry & Hulse,
First National Building,
El Paso, Texas.

In re: Paloma Land and Cattle Co.
General Mexican Claim.

Dear Mr. Rasberry:

This morning's mail brought the enclosed voucher for Payment of Awards from the Treasury Department. This voucher covers the sixth installment on the Palomas General Mexican Claim; covering a 6.2% installment. The net proceeds on this installment, as indicated by the voucher, will be \$99,308.70.

The procedure to be followed in executing the voucher and various affidavits is similar to that established in the past, and it will be appreciated if you will return the documents to me when they have been properly signed.

A copy of this letter is going to Mr. Coffin, Mr. Belcher, and Mr. Sevitz, so that they may be informed of the issuance of this voucher.

With the Compliments of the Season,

Sincerely yours,

.....,
JAMES R. GARFIELD.

cc to Mr. Wm. T. Coffin

to Mr. Coffin, Lawler, Felix & Hall, Standard
Oil Bldg., Los Angeles 15, Cal.

to Mr. Frank B. Blecher, Jennings & Belcher,
Security Bldg., Fifth and Spring Sts., Los
Angeles 13, California.

Mr. Robert J. Sevitz, Security-First Natl. Bank
of Los Angeles, Los Angeles 54, Cal. [145]

Exhibit No. 26

Burges, Scott, Rasberry & Hulse
Attorneys and Counsellors at Law
First National Building
El Paso, Texas

January 3, 1950

Mr. James R. Garfield,
Garfield, Baldwin, Jamison, Hope & Ulrich,
1425 National City Bank Building,
Cleveland 14, Ohio.

In re: Palomas Land and Cattle Company
General Mexican Claim.

Dear Mr. Garfield:

This will serve to acknowledge receipt of your letter of December 29, 1949, enclosing voucher covering the sixth installment on the Palomas General Mexican Claim covering a 6.2% installment, the net proceeds being the sum of \$99,308.70.

The attached letter to Mr. Henry T. Moore, an

attorney at law of Los Angeles, California, who is Mrs. Metcalf's Los Angeles legal adviser, is self-explanatory. The voucher was forwarded to Mr. Moore with the original of this letter.

I might add that Letha L. Metcalf is of course the former Letha L. Stephenson, widow of Marshall B. Stephenson, who several months ago married Jess L. Metcalf.

As you know, our firm is entitled to 15% of the proceeds due Palomas Land and Cattle Company as attorney's fees. Accordingly, when you have received the voucher and check has in turn been issued and paid, we respectfully request that for convenience you disburse the amount due Palomas Land and Cattle Company in two checks, one for 15% of the amount payable to this firm and the Palomas Land and Cattle Company, and one for the balance payable directly to Palomas Land and Cattle Company, and forward the two checks to us. We will then in turn have Palomas Land and Cattle Company endorse our check and deliver its check to Mrs. Metcalf.

With kind personal regards and best wishes, beg to remain

Yours sincerely,

/s/ J. L. RASBERRY,
J. L. RASBERRY.

JLR:vb

Exhibit No. 27

Burges, Scott, Rasberry & Hulse
Attorneys and Counsellors at Law
First National Building
El Paso, Texas

January 3, 1950

(Copy)

Mr. Henry T. Moore,
705 Title Guarantee Building,
411 West Fifth Street,
Los Angeles 13, California.

In re: Palomas Land & Cattle Company
General Mexican Claim.

Dear Henry:

We have this morning received voucher for payment of awards under the settlement of the Mexican Claims Act for the benefit of Palomas and others, as per copy of letter from James R. Garfield attached hereto.

Vouchers in regard to this matter in the past have been completed at El Paso but in view of the delivery of all records to Letha Stephenson Metcalf and the fact that Percy Pogson and his father, P. W. Pogson, are no longer officers of the company, the voucher mentioned will have to be executed in Los Angeles. I had a letter from Mrs. Metcalf, written December 28, 1949, from San Antonio in which she advised that she was flying back to Los Angeles on January 9th from Miami where she and her father are attending a cattlemen's con-

vention. I responded to the letter under date of December 29th but Mrs. Metcalf may not have received the letter for she did not give me the names of the officers of the company other than herself who is president, as I had requested. Upon receiving the voucher this morning, I undertook to locate her by telephone but she is on her way from New Orleans to Miami. Accordingly, I enclose the voucher to you herewith in the hope that the company has a vice-president who can execute the same, along with the [148] secretary, in Los Angeles. I am furnishing Mrs. Metcalf with a copy of this letter with the suggestion that she wire you authorizing the vice-president, if there is one, to execute the same in her absence. Otherwise, the execution thereof will have to be delayed until she returns to Los Angeles on January 9th. I have filled in the blanks in the form with as much information as I have and in view of the fact that I am familiar with the manner in which the form should be executed, make the following comments and suggestions thereon:

1. I have inserted the payee's name on the first page under the net amount. Underneath Mrs. Metcalf should sign on the line beginning with the word "Per" and her title of president should be added. Of course, if a vice-president executes it, the correct title should be inserted. In addition, the seal of the Palomas Land and Cattle Company should be affixed on this first page over the signature.

2. The affidavit of corporation appearing on the fourth page should be completed by inserting the names and addresses of either the president or vice-president and the secretary and, of course, each should sign at the proper place and the Notary should sign and add his seal.

3. The certificate as to authority, also appearing on the fourth page, should likewise be completed and signed by the secretary.

4. In addition, you will find attached to the voucher, "Supplemental Affidavit as to Corporation." It should be completed and executed by Letha L. Metcalf, if she is to execute the same. If not, it should be executed by the vice-president and of course it should be signed and the Notary should follow with his signature and seal. [149]

As soon as it is completed, please forward the same with the letter of transmittal to James R. Garfield at the address shown below, furnishing to me and the parties listed below a copy of such letter of transmittal so that they may be advised in the matter.

As indicated, I am furnishing Mr. Garfield, Mr. Belcher, Mrs. Sevitz and Mrs. Metcalf with a copy of this letter.

With kind personal regards and best wishes, beg
to remain

Yours sincerely,

/s/ J. L. RASBERRY,
J. L. RASBERRY.

JLR:vb

Encls.

cc: Mr. James R. Garfield

Garfield, Baldwin, Jamison, Hope & Ulrich
1425 National City Bank Building
Cleveland 14, Ohio

Mr. Frank B. Belcher
Jennings & Belcher
Security Bldg.
Fifth and Spring Sts.
Los Angeles 13, California

Mr. Robert J. Sevitz
Security-First National Bank of Los Angeles
Los Angeles 54, California

Mrs. Letha L. Metcalf
Roney-Plaza Hotel
Miami Beach, Florida

Mrs. Letha L. Metcalf
462 Mesa Road
Santa Monica, California [150]

Exhibit No. 28

Roland Rich Woolley
649 South Olive
Los Angeles, Cal.

January 19, 1950.

Garfield, Baldwin, Jamison, Hope & Ulrich,
1425 National City Bank Building,
Cleveland 14, Ohio.

Attn.: Mr. James R. Garfield.

Dear Mr. Garfield:

Enclosed find letter of Palomas Land and Cattle Company signed by its President, Letha L. Metcalf, and attested to by its Secretary, Mr. Clayton, addressed to your firm under date of January 19, 1950, which is self-explanatory.

Also enclosed is the voucher with the Palomas Land and Cattle Company as the payee duly certified to by Mrs. Letha L. Metcalf, President, and Mr. J. E. Metcalf, Treasurer, and Mr. Clayton as Secretary. There is attached thereto a supplemental affidavit of Mrs. Metcalf as the president certifying that the Palomas Land and Cattle Company is a California corporation; that the charter has not expired; that the corporation has not been dissolved and that it is in good standing.

Would you please advise us whether or not your firm has been requested in the past to make any payments direct to Burges, Scott, Rasberry & Hulse, First National Bank Building, El Paso, Texas. If so, will you please further inform us

y what authority the said firm made such request and furnish us with photostatic copies of any papers or documents relating thereto at our expense. Mrs. Metcalf, President of the Palomas Land and Cattle Company, informs me that it has always been her understanding and she was advised by the late Marshall Stephenson that the said El Paso firm were to be paid an amount equal to five per cent of what she received and not fifteen per cent. She further advises me that she has never seen any paper or instrument to the contrary. In going through the minute book, I find nothing in the book which would justify any fifteen per cent being paid to Burges, Scott, Rasberry & Hulse at El Paso, Texas.

Mrs. Metcalf wants to meet every just and honorable obligation. If they are entitled to it and substantiate their claim by proper documentary evidence, then she will recognize it. They have never informed her in the past. It seems to be that she has not been kept sufficiently informed in the past when these vouchers have come through. They have been signed by other persons and have been sent to our office without her knowledge or consent and she has finally received a check for the remaining amount purporting to come to her without any statement or breakdown attached thereto. She has never been consulted.

In other words it appears that things have been arbitrarily done—or at least too much has been taken for granted. I think it proper that I speak to you to advise you frankly in the matter so that you

will understand the purpose of the letter enclosed

Thanking you for your cooperation, I remain,

Very sincerely yours,

/s/ ROLAND RICH WOOLLEY,
ROLAND RICH WOOLLEY.

RRW:wjc

Encl.

Exhibit No. 29

January 19, 1950

Garfield, Baldwin and Vrooman
1425 National City Bank Building
Cleveland 14, Ohio

Gentlemen:

Referring to the Agreement dated October 29 1943, between the undersigned, Palomas Land and Cattle Company, a California Corporation, as first party, Security-First National Bank of Los Angeles, as second party, and your firm, as third party and as trustee:

Please be advised that the present officers and directors of the undersigned corporation are Letha L. Metcalf, President; J. E. Metcalf, Vice-President; and, W. J. Clayton, Secretary.

Please be further advised that no other person or persons have any authority or right to act for or represent the undersigned corporation in any matters, except its present counsel, who is Roland Rich Woolley, 649 South Olive Street, Los Angeles 14, California.

Please be further advised that all checks, pay-

ments and proceeds due and payable to said Palomas Land and Cattle Company, pursuant to the said Agreement of October 29, 1943, wherein it is provided that 7/19ths part of the funds to be received by reason of the award of August 26, 1943, in favor of Palomas Land and Cattle Company, are to be paid and sent direct to the office of Palomas Land and Cattle Company, at Room 915, 649 South Olive Street, Los Angeles 14, California.

At the present time there is no person at El Paso, Texas, who is authorized to speak for or act for the corporation, directly or indirectly, or at all.

Hereafter when and as you receive any payments from time to time by reason of the said award referred to and described in said Agreement of October 29, 1943, you are respectfully directed to remit to the undersigned corporation at the above address, its 7/19ths part thereof, together with your statement of breakdown and distribution as provided in said Agreement in your trustee capacity of the moneys received.

Any sum which is to be paid to Burges, Scott, Rasberry & Hulse will be paid by the undersigned corporation direct.

The undersigned corporation is advised that said El Paso firm has been causing to be paid to them an amount equal to 15% received by the corporation, which is an error. Any sum to be paid to them should not be in excess of an amount equal to 5%. The undersigned corporation is so informing you so you will be fully advised, and will also take that matter up directly with the said El Paso firm.

Will you also please advise the undersigned corporation at the above address whether or not the El Paso firm has requested you to send to them an amount equal to 15%, and if so, by what authority such request was made by them. It will be appreciated if you will fully advise us in this matter forthwith at said Los Angeles address.

The undersigned corporation encloses voucher for payment of award of appraisal certified under the settlement of the Mexican Claims Act of 1942, form 406, payee Palomas Land and Cattle Company, its address for the purpose of this voucher by virtue of said Agreement is in care of Mr. James R. Garfield, 1425 National City Bank Building, Cleveland 14, Ohio; docket No. 2067; last preceding payment made on voucher No. 1031699, paid January 31, 1949, amount of the award \$1,686,056.00. There is attached thereto supplemental affidavit of the President of the corporation for and in behalf of the corporation, duly acknowledged and notarized. You are requested to submit said voucher through the usual channels for payment, and upon receipt of payment, pursuant to said Agreement, retain for yourselves 5/19ths thereof; pay to the Security-First National Bank of Los Angeles 7/19ths thereof; and, pay direct to the undersigned corporation its 7/19ths thereof at Room 915, 649 South Olive Street, Los Angeles, California.

If there is any further assistance the undersigned corporation can give you in the matter please advise or contact our attorney, Roland Rich Woolley, Los Angeles, Calif.

Please accept our thanks for your kind cooperation.

Very truly yours,

PALOMAS LAND AND
CATTLE COMPANY.

By /s/ LETHA L. METCALF,
President.

(Letha L. Metcalf, formerly known as Letha L.
Stephenson.)

Attest:

/s/ W. J. CLAYTON,
Secretary.

Exhibit No. 30

Burges, Scott, Rasberry & Hulse
Attorneys and Counsellors at Law
First National Building
El Paso, Texas

January 23, 1950

Air Mail

Mr. James R. Garfield,
Garfield, Baldwin, Jamison, Hope & Ulrich,
1425 National City Bank Building,
Cleveland 14, Ohio.

In re: Palomas Land and Cattle Company
General Mexican Claim.

Dear Mr. Garfield:

I have a letter from Palomas Land and Cattle

Company, signed by Letha L. Metcalf (formerly Mrs. Marshall B. Stephenson), dated January 19, 1950, in which our 15% attorney's fees is for the first time questioned. In substance, Mrs. Metcalf says that it had always been her understanding that we were to be paid an amount equal to 5% and not an amount equal to 15%. She makes no mention of having forwarded the voucher to you but I am informed that in a telephone conversation with Mr. Pogson, she advised him a day or so ago that she had forwarded the voucher to you. She further states in her letter that Palomas has employed Roland Rich Woolley as attorney, so apparently she has fired Henry Moore who represented her at Los Angeles in the past and to whom I sent the voucher to be executed. Mr. Moore acknowledged receipt of the voucher under date of January 6th and a copy was sent to you. Accordingly, please advise me whether or not you have received the voucher, duly executed.

In view of the question raised as to our attorneys' fee, I have an idea, although Mrs. Metcalf does not so state, that she has instructed you to forward Palomas' part of the award, as well as all vouchers in the future, direct to Palomas, c/o Mr. Woolley. While I feel certain that you will do so in any event, I respectfully request, under the circumstances, that you continue disbursing the amount due Palomas Land and Cattle Company in two checks, one for 15% of the amount, payable to this firm and Palomas Land and Cattle Company, and one for the balance payable to Palomas Land

and Cattle Company. It is my plan to forward both checks to a bank in Los Angeles with instruction to deliver Palomas' part of the award upon endorsement of our check for 15%. I am afraid that if this isn't done, payment of our part will be delayed. Please also continue to send us the vouchers in order that we may in turn forward them, for I want to keep advised of the situation at all times. I feel that we are due this consideration, both because I have previously furnished you with a copy of the agreement setting apart 15% of all sums realized by Palomas to us as attorney's fees, but also because as attorney who represented Palomas, I have a lien on this award for our attorney's fees.

I will very much appreciate your cooperation.

With kind personal regards and best wishes, beg to remain

Yours sincerely,

/s/ J. L. RASBERRY.

JLR:vb

Exhibit No. 31

January 26, 1950.

Roland Rich Woolley, Attorney,
649 South Olive,
Los Angeles, 14, California.

In re: Palomas Land and Cattle Company
Mexican Claim.

Dear Mr. Woolley:

Mr. Garfield is away from the office at the present time because of illness, but in his absence, your letter of January 19, 1950, and the letter of January 19, 1950, from the Palomas Land and Cattle Company have been considered by his partners.

It is our obligation, when we have been placed on notice that another person has an interest in the proceeds of a settlement, to make checks jointly to the claimant and the other interested person. Therefore, the original checks in connection with the Palomas Land and Cattle Company Mexican claim, covering the 7/19 share of the total remittance, were made payable to the Palomas Land and Cattle Company and Burgess, Scott, Raspberry & Hulse, its attorneys. Later, the attorneys presented to this office a copy of their contract with the Palomas Land and Cattle Company indicating that their fees were to be computed on the basis of 15% of the amount available for Palomas Land and Cattle Company, and requested that the amount representing their fees be covered by a separate check.

Thereafter, this office wrote two checks, one payable to Palomas Land and Cattle Company and Burgess, Scott, Rasberry & Hulse, its attorneys, for 15% of the funds available on the Palomas share; and another check to Palomas Land and Cattle Company for the balance. The checks covering the fee portion have always been endorsed by the Palomas Land and Cattle Company, and signed by two of its officers i.e., by P. W. Pogson, Vice President, and Percy W. Pogson, Jr., Secretary and Treasurer. No objection having been raised by the Palomas Land and Cattle Company to the manner of remittance, we have so handled for the past several years.

The photostatic copy of the contract submitted to this office by Burgess, Scott, Rasberry & Hulse is enclosed, and you will observe that the fee is to be computed an 15%, rather than 5%, inasmuch as the matter for which the attorneys were employed became the subject of an action brought in the District Court of the United States, District of Columbia, Case 21295, entitled Security First National Bank of Los Angeles, vs. Palomas Land and Cattle Company, et al.

Because it is our thought that a review of the photostatic copy of the contract will indicate to you and your client, Mrs. Metcalf, that the 15% fee is proper, we felt you might not wish to incur the additional expenses in obtaining photostatic copies of the various letters which we received and wrote at the time of remitting the installments. However if you are still desirous of obtaining additional photostatic

data, we shall procure such for you upon your advice.

It has always been our understanding that the vouchers were executed in the manner followed to facilitate the handling of the matter, and to avoid delays. While we cannot say what information Mr. Rasberry turned over for the files of the Palomas Land and Cattle Company, we at all times gave the details to him to satisfy him that the proper amounts were being remitted for the Palomas account. If there remains any question in the minds of the present officers of the Palomas Land and Cattle Company that the proper amounts found their way into the accounts of Palomas Land and Cattle Company, we can supply the information to permit an audit of its records concerning this matter.

We shall await your further advice.

Yours very truly,

GARFIELD, BALDWIN,
JAMISON, HOPE & ULRICH,

By
L. R. ULRICH.

LRU:mb

CC to Mr. MM

CC to Mr. Rasberry

Exhibit No. 32

Roland Rich Woolley
649 South Olive
Los Angeles 14, Cal.

January 31, 1950

Garfield, Baldwin, Jamison, Hope and Ulrich
1425 National City Bank Building
Cleveland 14, Ohio

Re: Palomas Land and Cattle Company
Mexican Claim.

Gentlemen:

Your letter of January 26th last received in re the above matter. In the second paragraph of your letter you state as follows:

“It is our obligation, when we have been placed on notice that another person has an interest in the proceeds of a settlement, to make checks jointly to the claimant and the other interested person. Therefore, the original checks in connection with the Palomas Land and Cattle Company Mexican claim, covering the 7/19 share of the total remittance, were made payable to the Palomas Land and Cattle Company and Burgess, Scott, Rasberry & Hulse, its attorneys. Later, the attorneys presented to this office a copy of their contract with the Palomas Land and Cattle Company indicating that their fees were to be computed on the basis of 15% of the amount available for Palomas Land and

Cattle Company, and requested that the amount representing their fees be covered by a separate check."

I have been furnished with a photostatic copy of the paper relied upon by Burges, Scott, Rasberry & Hulse, dated August 6, 1943.

I have not been furnished with any resolution of the Board of Directors of Palomas Land and Cattle Company approving said paper, neither can I find any in the Minute Book of the corporation. Have you been furnished with such a resolution. If so, please furnish this office with a copy of same.

Will you please furnish me with any direct authorization you have, as Trustee, by reason of the agreement of October 29, 1943, to make payments to Berges, Scott, Rasberry & Hulse. I observe nothing in the said agreement of October 29, 1943, in your Trustee capacity, other than that you are to promptly, upon receipt of any sums paid or payable on account of said award, disburse the same according to the terms of that trust relationship. Will you please advise me what authority you have and relied upon to turn any of the funds of the Palomas Land and Cattle Company over to said firm, or to make any checks payable or co-payable to the said firm. [15]

Mr. Rasberry called me on the phone and advised me that you were furnishing him with a copy of my correspondence as well as copies of correspondence of Palomas Land and Cattle Company to you. That

is your privilege. We have no objection if you wish to do it that way. I am only endeavoring to ascertain the real facts in this matter and it is not my desire to deprive any lawyer of anything that he is legally entitled to.

May I further ask are you in possession of any assignment or purported assignment whereby the said Palomas Land and Cattle Company has assigned to said Burges, Scott, Rasberry & Hulse any interest in the Palomas award? If so will you please furnish me with a photostatic copy thereof.

Mrs. Metcalf the President would like to have a copy of the award settlement as of August 26, 1943, upon which the agreement of October 29, 1943, is based—that is, a photostatic copy. The company will pay for it.

You are again instructed in behalf of Palomas Land and Cattle Company that so far as I have been able to ascertain you are not authorized to turn over to any person or persons whatsoever any part of the 7/19th part of the Palomas award.

Thanking you for your cooperation, I am

Very truly yours,

/s/ ROLAND RICH WOOLLEY,
ROLAND RICH WOOLLEY,
Attorney for Palomas Land
and Cattle Company.

RRW:m

Via Air Mail

Registered [160]

Exhibit No. 33

February 6, 1950.

Mr. Roland Rich Woolley,
649 South Olive Street,
Los Angeles, California.

Re: Palomas Land & Cattle Company
Mexican Claim.

Dear Mr. Woolley:—

We wish to acknowledge receipt of your letter of January 31, 1950.

In reply to your inquiry as to whether or not we have been furnished with any resolution of the Board of Directors of Palomas Land & Cattle Company approving the agreement of August 6, 1943, we are not in possession of any such resolution.

Recently we furnished you with a copy of a certain agreement between Palomas Land & Cattle Company and Burges, Scott, Rasberry & Hulse which we have construed to constitute an equitable assignment in the recovery of any proceeds of the claim. We have no other document in the form of an assignment.

We are enclosing photostat of the award settlement entered by the American Mexican Claims Commission dated August 29, 1943, showing an award in the principal sum of \$1,686,056. We have attached to this photostat a photostat of a letter from the Commission to Mr. James R. Garfield, dated June 15, 1943, announcing the appraisal of the Commission in which it states that the appraisal will be final unless an appeal is taken.

So that you will have before you a documentary history of our transactions in regard to this claim during the past few years, we are enclosing the following photostats:

(1) Letter of 5/31/47 from Mr. J. L. Rasberry to Mr. Garfield;

(2) Our letter of 7/1/47 to Mr. Rasberry;

(3) Our check of 7/1/47 enclosed in the last mentioned letter;

(4) Letter from Mr. Rasberry to Mr. Garfield dated 1/24/48,

(5) Our letter to Mr. Rasberry dated 3/4/48;

(6) Our check dated 3/4/48 referred to in the last mentioned letter;

(7) Letter from Mr. Rasberry to Mr. Garfield dated 12/27/48;

(8) Our letter to Mr. Rasberry dated 2/4/49;

(9) Our check enclosed in the last mentioned letter;

(10) Letter of Mr. Rasberry to Mr. Garfield dated 1/3/50.

You will note that each of the letters from Mr. Rasberry to Mr. Garfield requested that our firm forward 15% of the net proceeds due Palomas Land & Cattle Company to be set forth in a separate check payable jointly to Palomas Land & Cattle Company and Burges, Scott, Rasberry & Hulse. Copies of each of these letters were sent to Mrs. Letha L. Stephenson and P. W. Pogson, Jr. Copies of Mr. Rasberry's letters of January 24, 1948, and

December 27, 1948, were also sent to Mr. Henry T. Moore, who we understand was then acting as personal counsel for Mrs. Stephenson.

We also ask you to note that in each of our letters transmitting the checks representing the share of the Palomas Land & Cattle Company of July 1, 1947, March 4, 1948 and February 4, 1949, we requested endorsements of both the check payable only to Palomas Land & Cattle Company and the check payable jointly to Palomas Land & Cattle Company and Mr. Rasberry's firm by two officers of the company. This request was made because two officers had signed the vouchers that had been forwarded to the Treasury Department. We call your attention to the fact that the three enclosed checks made payable to Palomas Land & Cattle Company and Mr. Rasberry's firm were personally endorsed by the Vice President and Secretary-Treasurer of the Palomas Land & Cattle Company.

By virtue of the active participation of the officers of the company for the past four years in the matter of the disbursement of the proceeds of this claim, and by virtue of the fact that Mrs. Stephenson was fully aware of the conduct of Mr. Rasberry in requesting the check to be made payable to his firm, we assumed that our disbursements were meeting with the approval of all parties concerned.

We hope that the enclosures will be of assistance to you in straightening out the rights of the several parties. Please rest assured, however, that we stand ready to answer any further questions that you may have. In the meantime we are requesting a further

examination of our files to make sure that there are no other documents that might be of interest to you.

Very truly yours,

GARFIELD, BALDWIN, JAM-
ISON, HOPE & ULRICH,

By

VRB/SW

Copy: Burges, Scott,
Rasberry & Hulse.

Exhibit No. 34

Burges, Scott, Rasberry & Hulse
Attorneys and Counsellors at Law
First National Building
El Paso, Texas

February 6, 1950.

Mr. L. R. Ulrich,
Garfield, Baldwin, Jamison, Hope & Ulrich,
1425 National City Bank Building,
Cleveland 14, Ohio.

In re: Palomas Land and Cattle Co.
Mexican Claim.

Dear Mr. Ulrich:

Supplementing my letter of January 31, 1950, and in further response to your letter of January 26, 1950, beg to formally demand that the Trustees, James R. Garfield and Arthur D. Baldwin, under no circumstances deliver our 15% part of the pro-

ceeds realized by Palomas Land and Cattle Company from the above claim to the Palomas Land and Cattle Company but, on the contrary, we must insist that our part of these proceeds be paid over and delivered to us by the Trustees.

It is our position that the contract dated August 6, 1943, photostat copy of which has heretofore been furnished you, entitles us to the delivery of these funds direct to us.

For your further information, Mrs. W. H. Burges, widow of our deceased partner, W. H. Burges, and Jane Burges Perrenot, daughter of our deceased partner, Richard F. Burges, as well as the surviving members of the partnership, to wit, Louis A. Scott, J. L. Rasberry and J. F. Hulse, have an interest in the 15% attorney's fee provided for by the contract mentioned.

With kind personal regards and best wishes, beg to remain

Yours sincerely,

/s/ J. L. RASBERRY,
J. L. RASBERRY.

JLR:vb

Exhibit No. 35

Roland Rich Woolley
649 South Olive
Los Angeles, Cal.

14

February 13, 1950.

Garfield, Baldwin, Jamison, Hope & Ulrich
1425 National City Bank Building
Cleveland 14, Ohio

Re: Palomas Land & Cattle Company
Mexican Claim.

Gentlemen:

Your letter of February 6th with the enclosures referred to therein received.

Referring to the photostatic copy of the letter dated May 31, 1947, will you please advise me whether or not the firm of Burges, Scott, Rasberry & Hulse sent you any resolution or special authority of Palomas Land and Cattle Company authorizing the sending of such letter on the part of Mr. Rasberry's firm and also whether or not you ever received from the Palomas Land and Cattle Company any resolution or action of its Board of Directors authorizing you to act in pursuance to the request contained in the said letter of May 31, 1947. I can find no such authorization directed to your firm nor to Mr. Rasberry's firm or to Mr. Rasberry personally authorizing or directing the writing of such letter referred to by the said Rasberry's

firm or the distribution of the money by your firm as requested by Rasberry's firm.

Inasmuch as Burges, Scott, Rasberry & Hulse were and have been at all times in a fiduciary relationship to Palomas Land and Cattle Company and the same applies to your firm insofar as the distribution of this money is concerned, my request for such information in behalf of the Palomas Land and Cattle Company is reasonable and justified.

I also note that the photostatic copies of the checks you enclosed dated July 1, 1947, March 4, 1948, and February 4, 1949, were made payable to "Palomas Land and Cattle Company and Burges, Scott, Rasberry and Hulse, its attorneys." Will you please advise me by what authority you caused said checks to be drawn as stated rather than directly to Palomas Land and Cattle Company. Being in the fiduciary position which you are to Palomas Land and Cattle Company and have been at all times I feel that my request is reasonable and justified.

As to the endorsements on the checks I note that none of them were ever presented to the then Mrs. Stephenson, now Mrs. Metcalf, the president of the corporation for signature. She advises me that she was never consulted relative thereto or even privileged to see the checks or to be consulted with respect to them. Again I refer you to the photostatic copy you furnished me dated January 24, 1948—which is a letter by Rasberry to your firm.

I make the same request and ask for the same

information relative to the contents of that letter. It is noted that that letter clearly discloses the possessory manner in which Mr. Rasberry was apparently acting. I have found no authority in the minute books of the corporation authorizing him to make such assumptions on his part. He was in a fiduciary relationship to the corporation as well as to the then Mrs. Stephenson, now Mrs. Metcalf, at the time he wrote that letter.

Referring to the photostatic copy of your letter dated March 4, 1948, to the Burges, Scott, Rasberry and Hulse firm, I respectfully ask for the same information and authority as I requested referring to the above previous letters.

Referring to the letter dated December 27, 1948, addressed by J. L. Rasberry to your firm, I respectfully request the same information relative to that letter and any action you took in connection therewith.

Referring to the letter dated February 4, 1949, addressed by you to the Burges, Scott, Rasberry and Hulse firm and signed by Mr. Garfield, I make the same requests as above stated.

Referring to the letter dated July 1, 1947, addressed to Burges, Scott, Rasberry and Hulse by A. B. Baldwin of your firm, I respectfully request the same information and data as requested with respect to the previous letters referred to.

Referring to the letter dated January 3, 1950, addressed to you and signed by J. L. Rasberry, I also make the same request in behalf of the Palomas

Land and Cattle Company as I have made for the previous letters mentioned.

In answer to my letter of January 31st last I note you state "we are not in possession of any such resolution" which I requested in my letter. It would appear there is none. I cannot find it in the minute books. I requested it from Mr. Rasberry. This morning I received an evasive letter from him stating that he didn't have the minute books and referred me to them. He knows whether there is any such resolution, but he has failed to answer the question directly.

Referring to the paper dated August 6, 1943, addressed to Burges, Scott, Rasberry and Hulse, El Paso, Texas, signed by Palomas Land and Cattle Company without a seal and without the secretary's signature of the company; and I can find no resolution in the minutes to support it, I respectfully differ with you that it constitutes an equitable assignment in the recovery of any proceeds in the claim referred to or any equitable assignment at all. I will go thoroughly into the matter.

Mrs. Metcalf has given me certain information with respect to the attitude and conduct of Burges, Scott, Rasberry and Hulse in this matter since the death of Mr. Stephenson. All I am interested in are the facts.

Will you please advise me when you were first informed that Mrs. Stephenson was the president of the Palomas Land and Cattle Company or were you ever so informed.

Will you please also inform me whether or not

any other resolution or resolutions of Palomas Land and Cattle Company were ever furnished you by Burges, Scott, Rasberry and Hulse or Palomas Land and Cattle Company or any other person or persons authorizing and directing you to distribute the money in the manner in which you have, all of which is contrary to that certain trust agreement dated as of the 29th of October, 1943, between Palomas Land and Cattle Company as the First Party, the Security First National Bank as the Second Party and your firm as the Third Party and referred to therein as the Trustee.

Your continued cooperation in this matter will be appreciated.

Very truly yours,

/s/ ROLAND RICH WOOLLEY,

ROLAND RICH WOOLLEY,

Attorney for Palomas Land
and Cattle Company.

RRW:wjc

Exhibit No. 36

February 17, 1950.

Mr. Roland Rich Woolley,
649 South Olive Street,
Los Angeles, California.

Re: Palomas Land & Cattle Company—
Mexican Claim.

Dear Mr. Woolley:—

We wish to acknowledge receipt of your letter of February 13th.

For your information, we do not have in our possession any resolution, certified or otherwise, of the Palomas Land & Cattle Company authorizing the contract of the employment of the Rasberry firm, or directing the distribution of part of the award jointly to Palomas Land & Cattle Company and the Rasberry firm. You are in possession of those documents upon which we relied for distribution made to the date hereof.

In reply to your inquiry regarding our information concerning the presidency of Mrs. Stephenson, we wish to advise that in a letter from Mr. Rasberry to Mr. Garfield, dated May 31, 1947, there was the following statement:

“Since Marshall’s death his widow, Letha L. Stephenson, who now lives in California, has been president of the company. However, P. W. Pogson is vice president and Percy W. Pogson, Jr., is secretary-treasurer.”

From the note at the bottom of this letter it would

appear that Mrs. Stephenson received a copy of it. This apparently is the first information we had of her presidency. Unfortunately, Mr. Garfield is away from the office and he might have been personally familiar with the facts.

We have recently received from Mr. Rasberry a copy of your letter to him dated February 13, 1950. It now appears that Palomas Land & Cattle Company, represented by you, and Mr. Rasberry, have now reached such a position that it will be almost impossible for an immediate agreement concerning the distribution of the portion of the award now in the process of collection. You have made a demand upon us that the entire share payable to Palomas Land & Cattle Company be distributed by check payable solely to that company. Mr. Rasberry has made a demand upon us that we distribute 15% of the proceeds available to Palomas Land & Cattle Company by a check payable jointly to his firm and the company. Obviously, these two demands are inconsistent. We, as trustees, for the first time knowing of such a conflict, have no choice but to seek a judicial determination of the rights of the parties. Under the Federal Interpleader Act we could file an action in either the District Court of Los Angeles or El Paso. Recognizing Palomas Land & Cattle Company as our client and the Rasberry firm as a claimant of part of the funds of such client, we have determined to file this action in the District Court of Los Angeles. We are in the process of preparing the required papers and the action will be filed as soon as the proceeds are avail-

able. In the meantime, if you are able to come to any agreement with Mr. Rasberry, we would appreciate your immediate advice.

Very truly yours,
GARFIELD, BALDWIN, JAMISON, HOPE &
ULRICH,

By
VRB/SW

Exhibit No. 37

March 13, 1950.

Palomas Land and Cattle Company,
Room 915,
649 South Olive Street,
Los Angeles 14, California.

Gentlemen:

The check covering the current 6.2% installment on the General Mexican claim has now been deposited, in the total amount of \$99,308.70. Distribution is being made as shown in the computations below:

1. Total amount of the award in this case is.....	\$1,686,056.00
2. Current installment, based on 6.2% of the award would figure	\$ 104,535.47
3. The charge made by the government is 5% of the above installment	5,226.77
4. Net payment by Government on this installment..	\$ 99,308.70
5. The division of the above amount is:	
7/19 forwarded for the account of Security- First National Bank of Los Angeles.....	\$36,587.42
5/19 to this firm	26,133.86

Palomas Land and Cattle Company (being 7/19 of \$99,308.70 less 15%, \$5,488.11 which is being paid into the Registry of the United States District Court, Southern District of California, pending order of that Court on its distribution)	31,099.31
Deposited with the Registry of the District Court of United States, Southern District, pending order of that Court 15% of 7/19 of \$99,308.70, as explained in preceding item	5,488.11
	<hr/>
	\$99,308.70

The check, payable to Palomas Land and Cattle Company, in the amount of \$31,099.31, (being 7/19 share of \$99,308.70 less \$5,488.11, 15% of the 7/19 share) is enclosed.

We trust that this method of handling the situation will meet with your approval.

Yours very truly,
GARFIELD, BALDWIN, JAMISON, HOPE &
ULRICH,

By,
L. R. ULRICH.

LRU:mb

cc to Mr. MM

Receipt of Copy Acknowledged.

[Endorsed]: Filed May 19, 1950.

[Title of District Court and Cause.]

ADDITIONAL AFFIDAVIT OF LETHA L.
METCALF, IN OPPOSITION TO ORDER
TO SHOW CAUSE

State of California,
County of Los Angeles—ss.

Letha L. Metcalf, being first duly sworn, deposes and says: That she is President of the Palomas Land and Cattle Company, a California corporation, named as one of the defendants in the above-entitled action; that she is also the widow of Marshall B. Stephenson, who died on the 11th day of May, 1946; that she married the said Marshall B. Stephenson on the 16th day of April, 1943; and that at that time the said John L. Rasberry was the attorney for the said Marshall B. Stephenson and defendant Palomas Land and Cattle Company, and that to affiant's knowledge said attorney-client relationship existed continuously at least from April 16, 1943, to the date of the death of said Marshall B. Stephenson, and existed prior to any alleged agreement between the defendant, Palomas Land and Cattle Company, and the said John L. Rasberry; that said [182] John L. Rasberry continued as the attorney for affiant, defendant Palomas Land and Cattle Company and the Estate of affiant's deceased husband until the month of January, 1950;

That affiant has read the Affidavits of John L. Rasberry and of Arthur D. Baldwin filed herein.

That affiant does not at this time propose to answer all of the false or erroneous statements made in said Affidavits concerning the merits of the respective contentions of plaintiff and of the defendants, feeling as affiant does that certain of the matters disclosed in both of said Affidavits constitute breaches of fiduciary duty, both on the part of attorney and trustee in divulging obviously confidential matters, such as alleged statements in alleged income tax returns and demonstrating an obvious willingness on the part of attorney and trustee to collusively cooperate for a purpose other than the protection of client and beneficiary;

Affiant desires, however, to point out that in reference to the specific matter before this honorable court at this time, i.e., whether there is any justification in law or equity for the Trustee to withhold from Palomas Land and Cattle Company monies payable to it under a Trust Agreement, that the present claim, both on the part of the defendant law firm and the plaintiff trustee, that there was at any time an assignment to the defendant law firm of an interest in the award to Palomas Land and Cattle Company is a patent invention as becomes obvious from an examination of the documents submitted in their respective Affidavits by the said John L. Rasberry and the said Arthur D. Baldwin;

1. Both of said Affidavits demonstrate that prior to the death of affiant's husband, said Marshall B. Stephenson, there was no claim by either defendant

law firm or plaintiff trustee that any such assignment had been made.

2. That prior to the death of affiant's said husband, only one check was disbursed in each instance by plaintiff trustee [183] for the amount of Palomas Land and Cattle Company's share of said award;

3. That after the death of affiant's said husband, and "for convenience" (Exhibit 10—Affidavit of Arthur D. Baldwin), the said John L. Rasberry requested plaintiff trustee to disburse two checks, one directly to defendant law firm and the balance to defendant Palomas Land and Cattle Company; that affiant never received a copy of said letter and plaintiff trustee refused to accede to such request, calling the attention of the said John L. Rasberry that "the distribution of the funds is to be made in accordance with the terms of the contract of October 29, 1943." (Exhibit 13—Affidavit of Arthur D. Baldwin);

4. That the said John L. Rasberry's own statement demonstrates that funds which came to him were by way of "payment" and not by way of any "assignment." See, for example, his statement to plaintiff trustee in the so-called "confidential" letter of May 31, 1947, (Exhibit 11—Affidavit of Arthur D. Baldwin): "We do not anticipate any argument about the matter for our portion thereof was paid without question during Marshall's lifetime.";

5. The said John L. Rasberry further recognizes that the distribution by the plaintiff trustee is to be made "in accordance with the terms of the contract of October 29, 1943," (Exhibit 14—Affidavit of Arthur D. Baldwin), and states further, "So long as Palomas Land and Cattle Company is joint payee in the check evidencing our attorney's fee you are taking no responsibility for the matter. In any event we will appreciate your handling the matter in the manner suggested";

6. The letter of the said John L. Rasberry dated January 23, 1950, (Exhibit 30—Affidavit of Arthur D. Baldwin), demonstrates an unlawful attempt by the said John L. Rasberry to obtain possession of all checks coming to Palomas Land and Cattle Company in an attempt to use possession of those checks as a club to force [184] payment by defendant Palomas Land and Cattle Company;

7. The letter of the said John L. Rasberry dated February 6, 1950, (Exhibit 34—Affidavit of Arthur D. Baldwin), is the first claim that the so-called agreement of August 6, 1943, entitled said defendant law firm to direct delivery of any funds. As quoted above, plaintiff trustee had previously rejected such a contention, and its contention made at the present time that this claim of defendant law firm is asserted "in good faith" is, therefore, untenable;

That the matters raised by plaintiff trustee and defendant law firm in their respective affidavits constitute an attempt to have this honorable court

at this time examine into the merits of the controversy; that such an examination is improper at this time; that the only question before the court at this time is whether or not the present form of action is maintainable; that as pointed out in affiant's prior Affidavit, there are a multitude of claims and cross-claims existing between the parties to this litigation, including the plaintiff trustee, which cannot properly be tried in an Action of Interpleader, and without the presence of said plaintiff trustee;

That affiant further states that before the Treasury of the United States will disburse any monies on account of said award to Palomas Land and Cattle Company, it has always been necessary in the past, and will continue to be necessary from time to time in the future as said installments on said award become payable, for Palomas Land and Cattle Company to execute a United States Treasury Voucher covering the full amount of any and all installments on such award, and that no monies will be disbursed to any one without such voucher from the said Palomas Land and Cattle Company.

/s/ LETHA L. METCALF,

Subscribed and sworn to before me, this 8th day of June, 1950.

[Seal] /s/ ROLAND RICH WOOLLEY,
Notary Public in and for
Said County and State.

Affidavit of Service by Mail Acknowledged.

[Endorsed]: Filed June 9, 1950. [185]

At a stated term, to wit: The February Term, A.D. 1950, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Monday, the 19th day of June, in the year of our Lord one thousand nine hundred and fifty.

Present: The Honorable James M. Carter,
District Judge.

[Title of Cause.]

For hearing (1) motion of defendant Palomas Land & Cattle Co., filed May 4, 1950, to dismiss the action for failure to state a claim against said defendant upon which relief can be granted; (2) order, filed March 30, 1950, directed to defendants to show cause, if any: (a) why the injunction of March 30, 1950, should not be made permanent; (b) why defendants should not be required to interplead, etc.; (c) why plaintiff should not be released and discharged from all further liability, etc.; (d) why plaintiff should not be allowed attorneys' fees, expenses and costs herein; (e) why this Court should not determine rights and claims of defendants herein; Edw. T. Butler, Esq., appearing as counsel for plaintiff; David Mellinkoff and Roland R. Woolley, Esqs., appearing as counsel for Defendant Palomas Land & Cattle Co.; Carl J. Shuck, Esq., appearing as counsel for all other defendants;

Attorney Mellinkoff argues in support of motion to dismiss and in opposition to Order to Show

Cause. Attorney Shuck argues for defendants other than Defendant Palomas Land & Cattle Co. Attorney Butler argues for plaintiff. Attorney Mellinkoff argues further.

Court orders cause stand submitted. [187]

At a stated term, to wit: The February Term, A.D. 1950, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held in the Court Room thereof, in the City of Los Angeles on Thursday, the 22nd day of June, in the year of our Lord one thousand nine hundred and fifty.

Present: The Honorable James M. Carter,
District Judge.

[Title of Cause.]

The following matters argued on June 19, 1950, are decided as follows:

(1) The motion of the defendant, Palomas Land and Cattle Company, filed May 4, 1950, to dismiss the action for failure to state a claim against said defendant, upon which relief could be granted, is denied;

(2) The order to show cause filed March 30, 1950, returnable May 8, 1950, thereafter continued to June 19th is granted, and an order will be prepared by the plaintiff containing the following provisions: (a) that the injunction of March 30, 1950, be made permanent; (b) that the defendants be required to interplead; (c) that the plaintiff be

released and discharged from all further liability; (d) that the plaintiff be allowed a reasonable attorney's fee, in the sum of \$500.00 per stipulation of the parties, and expenses and costs herein; (e) that this action proceed to determine the rights and claims of the defendants herein. [188]

[Title of District Court and Cause.]

OBJECTIONS TO PROPOSED FINDINGS OF
FACT, CONCLUSIONS OF LAW, PERMA-
NENT INJUNCTION AND ORDERS

Comes now the defendant Palomas Land and Cattle Company, a corporation, and without acceding to the correctness of the Minute Order heretofore entered in the above-entitled matter, nor to the correctness of any of the Findings of Fact and Conclusions of Law, the Permanent Injunction, and Orders proposed by the plaintiff herein, hereby makes the following specific objections for the reasons herein stated to said proposed Findings of Fact, Conclusions of Law, Permanent Injunction, and Orders:

I.

Findings of Fact

1. Finding of Fact II. The Trust Agreement dated October 29, 1943, being in evidence before the Court as a part of [191] the Affidavit of Letha L. Metcalf, and as Exhibit "B" to the Affidavit of John L. Rasberry, and as Exhibit 1 to the Affidavit

of Arthur D. Baldwin Finding of Fact II, rather than adopting certain conclusions of the pleader as to the effect of said document should more properly find that said document as above referred to, was heretofore entered into.

2. Finding of Fact IV.

(a) The Letter Agreement of August 6, 1943, being in evidence before the Court as a part of the Affidavit of Roland Rich Woolley, and as Exhibit "A" to the Affidavit of John L. Rasberry, and as Exhibit 12 to the Affidavit of Arthur D. Baldwin, Finding of Fact IV, instead of adopting the conclusions of the pleader as to the meaning and effect of said letter, should more properly find that said document, as above referred to, was heretofore entered into.

(b) The portion of the Finding in lines 8 and 9, on page 4, reading as follows:

"Prior to the commencement of this action, defendant law firm notified plaintiff"

is vague and uncertain in that it cannot be ascertained by said language what notification in evidence is referred to.

In this connection, it would appear that the notification referred to is the two letters of May 31, 1947, in evidence as Exhibits 10 and 11 to the Baldwin Affidavit; the alleged agreement of August 6, 1943 (Exhibit 12 to the Baldwin Affidavit), was enclosed with the letter identified as Exhibit 11 to the Baldwin Affidavit. Such being the case, the Finding should further state either that the claim

of the defendant law firm was rejected when made, or that in reply to said notification, plaintiff wrote to defendant law firm the letter in evidence as Exhibit 13 to the Baldwin Affidavit.

If, on the other hand, the letter of February 6, 1950, in [192] evidence as Exhibit 34 to the Baldwin Affidavit, is intended to be referred to in said Finding, the Finding more properly should make specific reference to said letter.

(c) In lines 18 to 21, appearing on page 4 of said Finding, it is proposed that the Court find defendant's contention to be either an equitable or a legal assignment. The latter contention has never been made by the defendant law firm and the endeavor to insert such a contention in the Findings is to go beyond anything which could have been intended by the Trial Court.

(d) The proposed Finding in lines 21 to 22, on page 4, of said Finding of Fact IV reading:

“Such contention is tenable.”

is likewise clearly beyond the contention that was urged upon the Trial Court.

As clearly stated in the Memorandum of Points and Authorities filed by the plaintiff herein (page 4, lines 5 to 6), it was plaintiff's contention that:

“As the Jurisdictional Facts Are Pleaded and Admitted, Plaintiff's Right to Interpleader Is Absolute.”

It was plaintiff's contention urged upon the Trial Court and apparently accepted by the Trial Court, that if the plaintiff demonstrated that there was the requisite diversity of citizenship, jurisdictional

amount, and a fund deposited in Court to which two parties were laying claim, that an absolute right to interpleader was established without regard to the question of whether or not the contention of either party was, or was not, "tenable." Such being the position of the plaintiff, and apparently adopted by the Trial Court, the Finding should state just that, and omit any conclusion that "such contention is tenable."

(e) Insofar as the plaintiff is concerned, [193] the contention of defendant Palomas is set forth in a letter in evidence, to wit, Exhibit 29 to Baldwin Affidavit, and this letter should be referred to in Finding IV, rather than in the form of the Conclusions stated in lines 22 to 25, page 4, of said Finding of Fact IV.

3. Finding of Fact VII.

(a) The proposed finding in lines 22 to 25, page 5, of Finding of Fact VII, that the plaintiff has never made any claim to the \$5,488.11, is directly contrary to paragraph 3, of the prayer of plaintiff's complaint filed herein. Despite the fact that the Trust Agreement expressly provides:

"The Trustees shall execute this Trust without charge. No expenses shall be incurred without first obtaining the written approval of Palomas and Bank."

the plaintiff here has claimed and is claiming a portion of the trust funds in connection with an alleged expense incurred without the consent, written or otherwise, of this defendant.

(b) The attempt to have the Court find, in line 28, on page 5, of Finding VII, that the defendant law firm's claim has been asserted in good faith, is again contrary to the argument urged upon the Court by the plaintiff, and is subject to the same objection heretofore set out in paragraph 2 (d) above.

(c) The assertion in lines 28 to 29, on page 5, of paragraph VII, that the plaintiff "could not and cannot safely determine for himself which of said claims is right" is plainly contrary to the determination already made by the plaintiff trustee as evidenced by Exhibit 13 of the Baldwin Affidavit.

(d) The further assertion, in lines 3 to 5, page 6, of the proposed Finding VII, that the plaintiff is in danger of being harassed in two legal actions is simply without evidentiary support. [194]

4. Finding of Fact VIII. If this finding is intended to state that merely "by reason of the withholding of disbursement of said sum of \$5,488.11" the Trustee has not breached his Trust, the Finding should clearly so state. If, on the other hand, the Finding is intended as a general approval of all of the Trustee's actions as Trustee in connection with those trust funds, it is clearly beyond the scope of the evidence introduced.

II.

Conclusions of Law

1. Conclusion of Law II. If the proposed orders be carried out, there will not be any sum of \$5,488.11,

as mentioned in line 4 of this conclusion, concerning which litigation may be had.

2. Conclusion of Law III. If such a conclusion is to be made at all, there should be substituted for the words, "on account of" (line 9, page 7), the words, "to account for." At most, if the plaintiff prevails in this proceeding, he will be discharged of any further liability to account for the moneys deposited in the registry of the Court, inasmuch as the money is thus accounted for; but the proceeding in interpleader not being a general review of the Trustee's administration of the Trust, could not possibly purport to discharge the plaintiff of any liabilities in connection with said moneys which may, at some later time, be recognized on a full review of the Trustee's administration of the Trust here involved.

III.

Orders

1. Paragraph 3, on page 3, of the proposed Orders partakes of the same vice present in Conclusion of Law II, as discussed above. [195]

2. Paragraph 4, of the proposed Orders, partakes of the same vice present in Conclusion of Law III, as discussed above.

Respectfully submitted,

ROLAND RICH WOOLLEY and
DAVID MELLINKOFF,

By /s/ DAVID MELLINKOFF,
Attorneys for Defendant Palomas Land and Cattle
Company. [196]

Affidavit of Service by Mail

State of California,

County of Los Angeles—ss.

Isabel E. Dyson, being first duly sworn, says: That affiant is a citizen of the United States and a resident of the county aforesaid; that affiant is over the age of eighteen years and is not a party to the within above-entitled action: that affiant's business address is: 211 South Beverly Drive, Beverly Hills, California; that on the 18th day of July, 1950, affiant served the within Objections to Proposed Findings of Fact, Conclusions of Law, Permanent Injunction and Orders on the plaintiff and on the defendants Louis A. Scott, John L. Rasberry and James F. Hulse, in said action, by placing two true copies thereof in an envelope addressed to the attorneys of record for said plaintiff at the office address of said attorneys, as follows:

Lawler, Felix & Hall; Wm. T. Coffin and Edward T. Butler,
800 Standard Oil Building,
Los Angeles 15, California;

and by placing two true copies thereof in an envelope addressed to the attorneys of record for said defendants Louis A. Scott, John L. Rasberry and James F. Hulse, at the office address of said attorneys, as follows:

Overton, Lyman, Prince & Vermille and Carl J. Schuck,
733 Roosevelt Building,
Los Angeles 17, California;

and by then sealing said envelopes and depositing the same, with postage thereon fully prepaid, in the United States Post Office at the city where is located the office of the attorneys for the person by and for whom said service was made.

That there is a delivery service by United States mail at the place so addressed and there is a regular communication by mail between the place of mailing and the place so addressed.

/s/ ISABEL E. DYSON.

Subscribed and sworn to before me this 18th day of July, 1950.

[Seal] /s/ DAVID MELLINKOFF,
Notary Public in and for
Said County and State.

[Endorsed]: Filed July 19, 1950. [197]

[Title of District Court and Cause.]

PLAINTIFF'S REPLY TO DEFENDANT PALOMAS' OBJECTIONS TO PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, PERMANENT INJUNCTION AND ORDERS

Comes now the plaintiff above named and replies as follows to the objections filed herein by defendant Palomas Land and Cattle Company to the proposed Findings of Fact, Conclusions of Law, Permanent Injunction and Orders heretofore submitted by plaintiff to the Court:

Findings of Fact

Objections 1, 2 (b) and 2 (e)

It is elementary that in making findings of fact the Court is not required to do more than cover the ultimate factual issues. *Gay Games v. Smith* (1943) 7 CR 132 F. (2d) 930, 932; *Brown Paper Mill v. Irwin* (1943) 8 CR 134 F. (2d) 337, 338; *Skelly Oil Co. v. Holloway* (1948) 8 CR 171 F. (2d) 670, 673. As noted in *Brown Paper Mill Co. v. Irwin*, *supra*, findings of fact should be a "concise statement of the ultimate facts and not a statement, report or recapitulation of evidence from which such facts may be found or inferred." 134 F. (2d) 338.

Reference to the aforementioned elementary rule, we submit, should suffice to dispose of objections 1, 2 (b) and 2 (e). Thus, objection 1 is that the trust agreement is not set out in full in Finding II. The terms of that agreement are not in dispute. Copies of the agreement are included in the evidence. So far as the issue of interpleader is concerned, the only important terms of the agreement are those noted in Finding II, viz., that the subject of the agreement was an award of the American-Mexican Claims Commission in favor of defendant Palomas which was assigned to the plaintiff and his co-trustees and that the trustees were to collect sums payable on the award and disburse the same in stated proportions to defendant Palomas and others.

Again, objection 2 (b) is that Finding IV does not particularize the means whereby the notifica-

tion therein referred to was made nor the time of the notification. The dates and means of notification to the plaintiff of the conflicting claims asserted by defendant Palomas and defendant law firm are evidentiary matters. The ultimate fact, in so far as the issue of interpleader is concerned, is that prior to commencement of the action plaintiff was notified by defendant Palomas and defendant law firm of their respective and conflicting claims to the fund interpleaded.

Similarly, objection 2 (e) is that the particulars of defendant Palomas' contentions are not set forth in Finding IV. The important ultimate facts are those noted in Finding IV, viz., that [199] defendant Palomas denies the merits of the claim of defendant law firm and prior to the commencement of the action demanded that plaintiff pay to it the sum in controversy.

Objection 2 (a)

This objection is to the recital in Finding IV of the basis for the claim of defendant law firm. The gist of the objection seems to be that the recital amounts to a construction of the letter agreement referred to. That is not the case. The recital is only descriptive of the claim asserted by defendant law firm and in no sense a finding respecting the validity or otherwise of that claim or the letter agreement on which it is based.

Objection 2 (c)

This objection strikes us as frivolous. The right of plaintiff to interplead is the same whether the

assignment claimed by defendant law firm is equitable or legal. Finding IV as prepared refers to the claimed assignment as cognizable either at law or in equity. The finding was so prepared to avoid any fine distinction between law and equity and to avoid any unnecessary particularization of the contentions of defendant law firm.

Objections 2 (d) and 3 (b)

We do not understand what possible objection there can be to finding that the respective claims of defendant Palomas and defendant law firm are asserted in good faith and are tenable and, hence, are not frivolous or absurd. The documentary evidence, not to mention the pleadings, arguments of counsel and memoranda of authorities, demonstrates persuasively that each of the conflicting claims is asserted in good faith and is colorable and that a very real controversy exists as between defendant Palomas and defendant law firm. The cases noted in plaintiff's memorandum of authorities make it clear that the right to interplead conflicting claimants [200] does not depend upon the comparative merits of their respective claims. The fact, however, that the claims are colorable or tenable and not frivolous emphasizes the propriety of interpleader.

Objection 3 (a)

Manifestly, plaintiff's assertion of his statutory right to costs payable out of the fund interpleaded is not inconsistent with his disclaimer of any interest in the fund. If the case were otherwise, no stake-

holder could bring an action of interpleader unless he waived his right to recoup his costs from the fund.

Objections 3 (c) and 3 (d)

These objections are mere arguments respecting the evidence. The allegations of the complaint which defendant Palomas has admitted by its failure to interpose any answer afford abundant support for the findings to which objections 3 (c) and 3 (d) are directed. Moreover, the fact that the conflicting claims are tenable and are asserted vigorously makes it entirely clear that plaintiff could not resolve the conflict except at his peril and that unless he interpleaded the two claimants he would be vulnerable to a separate action by each.

Objection 4

This objection has no semblance of merit. A casual reading of Finding VIII suffices to show that it could not bear the construction which defendant Palomas fears.

Conclusions of Law

Objection 1

What is pointed out *supra* respecting objection 3 (a) to Finding VII suffices to demonstrate that defendant Palomas' objection to Conclusion II is baseless. The rights of the conflicting claimants to the [201] fund interpleaded are subordinate to the right of plaintiff to recoup his costs from the fund.

Objection 2

This objection cannot be taken seriously. The instant action is not for an accounting but in interpleader. The purpose of the action is to release and discharge the plaintiff from liability on account of, i.e., with respect to, the sum deposited in the registry of the Court. It is entirely clear, and counsel for defendant Palomas of course realize, that Conclusion III simply effectuates the purpose of the interpleader and exonerates plaintiff with respect to the sum interpleaded but in no wise impairs the right of any defendant to assert any liability to render an accounting or other liability which he may claim to exist on the part of plaintiff.

Orders

Objections 1 and 2

These objections are the same as objections 1 and 2 to the conclusions of law which are dealt with *supra*.

Respectfully submitted,

LAWLER, FELIX & HALL,
WM. T. COFFIN and
EDWARD T. BUTLER,

By /s/ WM. T. COFFIN,
Attorneys for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed July 20, 1950. [202]

At a stated term, to wit: The February Term, A.D. 1950, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Tuesday, the 25th day of July, in the year of our Lord one thousand nine hundred and fifty.

Present: The Honorable James M. Carter,
District Judge.

[Title of Cause.]

MINUTE ORDER

It Is Ordered that the objections filed by defendant Palomas Land and Cattle Company to the findings of fact, conclusions of law and order of injunction, etc., submitted by plaintiff, be and they are overruled; the court, however, has made the following additional conclusion, numbered "VII" and has added it to the bottom of page 7 of the findings and conclusions submitted by plaintiff:

"The findings of fact and the conclusions of law herein shall be effective only as supporting the "Injunction and Order directing interpleader, Discharging Plaintiff and Allowing attorneys' fees, expenses and costs" to plaintiff, and shall not prejudice or bind any of the defendants in any litigation between themselves following the making of the order of interpleader and the discharge of the plaintiff."

With the above addition, the court has signed the

findings of fact, conclusions of law, and permanent injunction and order in the form submitted by plaintiff. [205]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Arthur D. Baldwin, plaintiff, having filed herein his complaint for interpleader and having deposited in the registry of this Court the sum of \$5,488.11 to abide the judgment thereof, and this Court having made its order temporarily restraining defendant Palomas Land and Cattle Company, a corporation (herein sometimes referred to as “defendant Palomas”), and defendants Louis A. Scott, John L. Rasberry and James F. Hulse, partners doing business under the firm name and style of Burges, Scott, Rasberry & Hulse (herein sometimes referred to as “defendant law firm”), [206] and each of their agents, attorneys, servants and representatives from prosecuting any proceeding in any state or Federal court based upon any of the claims of defendants to said sum of \$5,488.11, and this Court having ordered said defendants and each of them to show cause why the aforesaid restraining order should not be made permanent and why said defendants should not be required to interplead their claims and rights to said sum of \$5,488.11 and why the further relief prayed in the complaint should not be granted, and defendant Palomas hav-

ing appeared and having filed a motion to dismiss said complaint, and defendant law firm having appeared and having answered said complaint, and said order to show cause having duly and regularly come on for hearing before the Honorable James M. Carter, Judge of the United States District Court in Courtroom 3 of the Federal Building in the City of Los Angeles, State of California, on the 19th day of June, 1950, at 10:00 o'clock a.m., Messrs. Lawler, Felix & Hall and Wm. T. Coffin and Edward T. Butler by Edward T. Butler, Esquire, appearing for plaintiff, and Roland Rich Woolley and David Mellinkoff, Esquires, appearing for defendant Palomas, and Messrs. Overton, Lyman, Prince & Vermille and Carl J. Schuck by Carl J. Schuck, Esquire, appearing for defendant law firm, and the Court, having considered said complaint and said motion and said answer and the affidavits filed herein by the parties and having heard the argument of counsel and considered the memoranda of points and authorities submitted by the parties and being fully advised in the premises, now separately states its findings of fact and conclusions of laws as follows:

Findings of Fact

The Court makes the following findings of [207] fact:

I.

This is an action of interpleader commenced on March 30, 1950, and brought under Section 1335 of Title 28 of the United States Code (June 25,

1948, c. 646, 62 Stat. 931). Plaintiff resides in the County of Cuyahoga, State of Ohio, and is a citizen of said state. Defendant Palomas Land and Cattle Company is a corporation organized under the laws of the State of California and is a citizen of said state, with its principal office in the County of Los Angeles in said state. Defendants Louis A. Scott, John L. Rasberry and James F. Hulse are partners engaged in the practice of law in the City of El Paso, State of Texas, under the firm name and style of Burges, Scott, Rasberry & Hulse, and said defendants and each of them are citizens of said State of Texas.

II.

Prior to the commencement of this action and on October 29, 1943, defendant Palomas, Security-First National Bank of Los Angeles, a national banking association (herein sometimes referred to as "Security Bank"), plaintiff, James R. Garfield and Clare M. Vrooman made and entered into a certain trust agreement under the terms of which defendant Palomas and Security Bank assigned, transferred and set over to plaintiff and the said James R. Garfield and Clare M. Vrooman, as Trustees, all their right, title and interest in and to a certain award of the American-Mexican Claims Commission in favor of defendant Palomas. Under the terms of said trust agreement, said Trustees were to collect, receive and receipt for all sums paid or payable on said award and to disburse the sums collected as follows:

- A 7/19ths share to defendant Palomas;
- A 7/19ths share to Security Bank;
- A 5/19ths share to said Trustees. [208]

III.

Thereafter and prior to the commencement of this action, said James R. Garfield and Clare M. Vrooman died and since their deaths plaintiff has been and is now the successor to their interests and the sole Trustee under said trust agreement.

IV.

Prior to the commencement of this action, defendant law firm notified plaintiff that by virtue of a certain letter agreement dated August 6, 1943, between it and defendant Palomas, whereby the latter employed defendant law firm to render legal services in connection with the claim of defendant Palomas which was the basis of the aforementioned award of said American-Mexican Claims Commission, defendant law firm was and is entitled to receive, and defendant law firm demanded and has continued to demand that plaintiff as said Trustee pay to it, 15% of the sums payable to defendant Palomas under the terms of said award and said trust agreement. Defendant law firm contends that said letter agreement dated August 6, 1943, constituted an assignment cognizable either at law or in equity to it of 15% of all sums payable to defendant Palomas pursuant to said award and said trust agreement. Such contention is tenable. Also

prior to the commencement of this action, defendant Palomas notified plaintiff that defendant law firm is not entitled to 15% or any other part of the sums payable to defendant Palomas under the terms of said trust agreement and demanded that plaintiff as said Trustee pay to defendant Palomas all of said sums collected by plaintiff pursuant to the aforementioned award, to wit, a 7/19ths share of collections made on said award. Defendant Palomas contends that said letter agreement dated August 6, 1943, does not constitute an assignment cognizable in law or equity or otherwise. Such contention is tenable. [209]

V.

Subsequent to plaintiff's notification of the aforesaid conflicting claims and demands of defendant law firm and defendant Palomas and on or about March 13, 1950, plaintiff as said Trustee collected and received from the Treasurer of the United States the sum of \$99,308.70 representing a sixth installment payment upon said award. On March 14, 1950, plaintiff disbursed to Security Bank the sum of \$36,587.42 as a 7/19ths share of the sum so collected and disbursed to himself as said Trustee the sum of \$26,133.86 as a 5/19ths share of the sum so collected. On the same day, plaintiff disbursed to the defendant Palomas the sum of \$31,099.31 as a 7/19ths share of the sum so collected minus 15% of said share, to wit, the sum of \$5,488.11.

VI.

Plaintiff has paid in to the registry of this Court said sum of \$5,488.11, the amount to which defendant law firm and defendant Palomas have asserted conflicting claims and demands, to abide the judgment thereof.

VII.

Plaintiff as said Trustee or otherwise does not now have or claim nor did he prior or subsequent to the commencement of this action have or claim any right, title or interest in and to said sum of \$5,488.11. The conflicting claims and demands to said sum made by defendant law firm and defendant Palomas upon plaintiff as Trustee at the time of the commencement of this action were and since have been asserted in good faith and plaintiff could not and cannot safely determine for himself which of said claims is right and lawful and could not and cannot make payment of all or any part [210] of said sum to either defendant law firm or defendant Palomas without incurring a risk of liability to the other, and plaintiff at the time of the commencement of this action was and since has been in danger of being harrassed and damaged by the costs of litigation and risks of liability in two actions on a single obligation.

VIII.

Plaintiff as said Trustee did not commit any breach of trust nor did plaintiff violate any fiduciary duty imposed upon him by said trust agreement by

reason of the withholding of disbursement of said sum of \$5,488.11 and the deposit of same as afore-said in the registry of this Court.

IX.

Plaintiff has expended as costs and expenses in this proceeding the sum of \$. and has incurred a liability to pay to his counsel of record herein reasonable compensation for their services in connection with this proceeding. The sum of \$500.00 is reasonable compensation for those services.

From the foregoing findings of fact, the Court makes the following conclusions of law:

Conclusions of Law

I.

The Court has jurisdiction of this cause under Section 1335 of Title 28 of the United States Code (June 25, 1948, c. 646, 62 Stat. 931). [211]

II.

Defendant Palomas and defendant law firm should be required to interplead, litigate and settle between themselves their claims and rights to the sum of \$5,488.11 deposited by the plaintiff in the registry of this Court.

III.

The plaintiff should be released and discharged from all liability to defendants or any of them on account of said sum of \$5,488.11.

IV.

This Court should retain jurisdiction over this cause and determine the validity and priority of the respective rights and claims of defendant law firm and defendant Palomas and direct the disposition of so much of said sum of \$5,488.11 deposited in the registry of this Court as may remain after payment therefrom of plaintiff's costs, expenses and attorney's fees.

V.

Plaintiff is entitled to have paid to him by the Clerk of this Court out of said sum of \$5,488.11 deposited by him in the registry of this Court his costs in the amount of \$. and fees for his attorneys in the sum of \$500.00

VI.

The defendants and each of them should be permanently enjoined and restrained from taking, maintaining or prosecuting against plaintiff any proceeding in any state or Federal court based upon any of the claims of defendants to said sum of \$5,488.11.

VII.

The findings of fact and the conclusions of law herein shall be effective only as supporting the "Injunction and Order directing interpleader, Discharging plaintiff and Allowing attorneys' fees, expenses and costs" to plaintiff, and shall not prejudice or bind any of the defendants in any litigation between themselves following the making of the

order of interpleader and the discharge of the plaintiff. [212]

Dated this 25th day of July, 1950.

/s/ JAMES M. CARTER,
District Judge.

The foregoing Findings of Fact and Conclusions of Law are approved as to form.

ROLAND RICH WOOLLEY and
DAVID MELLINKOFF,

By,
Attorneys for Palomas Land and Cattle Company,
Defendant.

OVERTON, LYMAN, PRINCE & VERMILLE
and CARL J. SCHUCK,

By /s/ CARL J. SCHUCK,
Attorneys for Louis A. Scott, John L. Rasberry
and James F. Hulse, Defendants.

Receipt of copy acknowledged.

[Endorsed]: Filed July 25, 1950. [213]

In the District Court of the United States, Southern
District of California, Central Division

No. 11340-C (Civil)

ARTHUR D. BALDWIN, as Surviving Trustee
Under a Certain Agreement of Trust Dated
October 29, 1943,

Plaintiff,

vs.

PALOMAS LAND AND CATTLE COMPANY,
a Corporation, and LOUIS A. SCOTT, JOHN
L. RASBERRY and JAMES F. HULSE,
Partners Doing Business Under the Firm Name
and Style of Burges, Scott, Rasberry & Hulse,
Defendants.

PERMANENT INJUNCTION AND ORDER
DIRECTING INTERPLEADER, DIS-
CHARGING PLAINTIFF, AND ALLOW-
ING ATTORNEY'S FEES, EXPENSES
AND COSTS

Arthur D. Baldwin, plaintiff, having filed herein his complaint for interpleader and having deposited in the registry of this Court the sum of \$5,488.11 to abide the judgment thereof, and this Court having made its order temporarily restraining defendant Palomas Land and Cattle Company, a corporation (herein sometimes referred to as "defendant Palomas"), and defendants Louis A. Scott, John L.

Rasberry and James F. Hulse, partners doing business under the firm name and style of Burges, Scott, Rasberry & Hulse (herein sometimes referred to as 'defendant law firm'), [215] and each of their agents, attorneys, servants and representatives from prosecuting any proceeding in any state or Federal court based upon any of the claims of defendants to said sum of \$5,488.11, and this Court having ordered said defendants and each of them to show cause why the aforesaid restraining order should not be made permanent and why said defendants should not be required to interplead their claims and rights to said sum of \$5,488.11 and why the further relief prayed in the complaint should not be granted, and defendant Palomas having appeared and having filed a motion to dismiss said complaint, and defendant law firm having appeared and having answered said complaint, and said order to show cause having duly and regularly come on for hearing before the Honorable James M. Carter, Judge of the United States District Court in Courtroom 3 of the Federal Building in the City of Los Angeles, State of California, on the 19th day of June, 1950, at 10:00 o'clock a.m., Messrs. Lawler, Felix & Hall and Wm. T. Coffin and Edward T. Butler by Edward T. Butler, Esquire, appearing for plaintiff, and Roland Rich Woolley and David Mellinkoff, Esquires, appearing for defendant Palomas, and Messrs. Overton, Lyman, Prince & Vermille and Carl J. Schuck by Carl J. Schuck, Esquire, appearing for defendant law firm, and the Court, having considered said complaint and said motion

and said answer and the affidavits filed herein by the parties and having heard the argument of counsel and considered the memoranda of points and authorities submitted by the parties and being fully advised in the premises and having made and filed herein its findings of fact and conclusions of law, now Orders, Adjudges and Decrees as follows:

1. That the motion of defendant Palomas to dismiss the complaint be and it hereby is denied;

2. That defendant Palomas Land and Cattle Company, a corporation, and defendants Louis A. Scott, John L. Rasberry and James F. Hulse, partners doing business under the firm name and style of Burges, Scott, Rasberry & Hulse, and each of their agents, attorneys, servants and representatives be and they hereby are each of them hereby is permanently enjoined and restrained from taking, maintaining and prosecuting against plaintiff any proceeding in any state or Federal court based upon any of the claims of said defendants or any of them to the sum of \$5,488.11 heretofore deposited by plaintiff in the registry of this Court;

3. That defendants interplead and litigate their respective claims and rights to said sum of \$5,488.11;

4. That plaintiff be and plaintiff hereby is released and discharged from any and all further liability to defendants or any of them on account of said sum of \$5,488.11;

5. That attorney's fees for plaintiff's counsel be and are hereby allowed and fixed in the amount of \$500.00 and plaintiff's costs and expenses be and are hereby allowed and fixed in the sum of

\$53.12, and the Clerk is hereby ordered to pay to plaintiff, out of said sum of \$5,488.11, the sum of \$500.00 as and for said attorney's fees and the sum of \$53.12 as and for said costs and expenses;

6. That this Court retain jurisdiction of this cause and determine the rights of the defendants in and to the balance of said sum of \$5,488.11 remaining after payment of the items aforesaid and that this action proceed forthwith.

Dated this 25th day of July, 1950.

/s/ JAMES M. CARTER,
District Judge. [217]

The foregoing Permanent Injunction and Order Directing Interpleader, Discharging Plaintiff, and Allowing Attorney's Fees, Expenses and Costs is approved as to form.

ROLAND RICH WOOLLEY and
DAVID MELLINKOFF,

By,
Attorneys for Palomas Land and Cattle Company,
Defendant.

OVERTON, LYMAN, PRINCE & VERMILLE
and CARL J. SCHUCK,

By /s/ CARL J. SCHUCK,
Attorneys for Louis A. Scott, John L. Rasberry and
James F. Hulse, Defendants.

Judgment entered July 25, 1950.

Receipt of copy acknowledged.

[Endorsed]: Filed July 25, 1950. [218]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is Hereby Given that the defendant Palomas Land and Cattle Company, a corporation, does hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the judgment and orders entered in this case on July 25, 1950, in Judgment Book No. 67, page 268, entitled "Permanent Injunction and Order Directing Interpleader, Discharging Plaintiff, and Allowing Attorneys' Fees, Expenses and Costs," and each and every part thereof.

Dated: August 18, 1950, at Beverly Hills, California.

ROLAND RICH WOOLLEY and
DAVID MELLINKOFF,

By /s/ DAVID MELLINKOFF,

Attorneys for Defendant Palomas Land and Cattle Company.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 23, 1950. [220]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

The defendant Palomas Land and Cattle Company, a corporation, having taken an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the Judgment and Orders entered in this case on July 25, 1950, does hereby designate for inclusion in the record on the appeal herein, the complete record and all the proceedings and evidence in the action.

Dated: September 8, 1950, at Beverly Hills, California.

ROLAND RICH WOOLLEY and
DAVID MELLINKOFF,

By /s/ DAVID MELLINKOFF,

Attorneys for Defendant Palomas Land and Cattle Company.

Affidavit of Service by Mail acknowledged.

[Endorsed]: Filed September 8, 1950. [222]

In the United States District Court, Southern
District of California, Central Division

No. 11340-C Civil

Honorable James M. Carter, Judge, Presiding.

ARTHUR D. BALDWIN, as Surviving Trustee
Under a Certain Agreement of Trust Dated
October 29, 1943,

Plaintiff,

vs.

PALOMAS LAND AND CATTLE COMPANY,
a Corporation, and LOUIS A. SCOTT, JOHN
L. RASBERRY, and JAMES F. HULSE,
Partners Doing Business Under the Firm Name
and Style of Burges, Scott, Rasberry & Hulse,
Defendants.

REPORTER'S TRANSCRIPT
OF PROCEEDINGS

Los Angeles, California

Monday, June 19, 1950

Appearances:

For the Plaintiff:

LAWLER, FELIX & HALL, by
EDWARD T. BUTLER, Esq.,

800 Standard Oil Building,
Los Angeles, California.

For the Defendant Palomas Land and Cattle
Company:

DAVID MELLINKOFF, Esq., and
ROLAND RICH WOOLLEY, Esq.,

118 South Beverly Drive,
Beverly Hills, California.

For the Defendants Burges, Scott, Raspberry
and Hulse:

OVERTON, LYMAN, PRINCE &
VERMILLE, by
CARL J. SCHUCK, Esq.,

733 Roosevelt Building,
Los Angeles, California.

The Clerk: No. 1 on the calendar. 11340-C Civil, Arthur D. Baldwin vs. Palomas Land and Cattle Company, and others. Hearing motion of defendant Palomas to dismiss, and hearing order to show cause.

Mr. Schuck: Your Honor, I am sorry I was delayed this morning. I was in Judge Peirson Hall's court, and he had several admissions that came ahead of us.

The Court: Mr. Butler, is it?

Mr. Butler: Yes, for the plaintiff Baldwin, your Honor.

Mr. Schuck: I am representing the defendants Burges, Scott, Raspberry and Hulse.

The Court: I regret that I have not had a chance

to read this entire file. I was in Seattle and got back at 1:00 o'clock yesterday, and the only time I have had to look over any of this file has been this morning, so I doubt if I will be able to decide it, but I would like to have you argue what are the issues. I understand you have exchanged briefs, and you ought to be able to know pretty well what the issues are through the interchange of those briefs.

I have read the complaint and I think I have in mind the general factual situation, not taking into account the extensive affidavits. I see there are affidavits on file here [3*] that I haven't had a chance to look at, but apparently Baldwin is a surviving trustee of a certain trust agreement. There is no argument that the other trustees are dead. He received some \$99,000 which, under the trust agreement, he is supposed to disburse 7/19ths to the defendant Palomas—is that correct?

Mr. Mellinkoff: Yes.

The Court: And 7/19ths to the Security Bank, and 5/19ths to the trustees, of which he is a survivor. Meanwhile, a law firm in Texas claimed that they have a letter assigning them a 15 per cent interest in the share of the defendant Palomas, dated August 6, 1943, which apparently antedated the trust agreement of October 29, 1943.

Mr. Mellinkoff: That is correct.

The Court: Then the trustee, out of this first chunk of money, being the first payment, as apparently there are going to be some more later on——

* Page numbering appearing at top of page of original Reporter's Transcript.

Mr. Mellinkoff: There have been some payments already, your Honor.

The Court (Continuing): —he pays himself the percentage he is entitled to, he pays the Security Bank the percentage they are entitled to, and he holds out the 15 per cent, the claimed 15 per cent of the amount that Palomas would be otherwise entitled to according to his calculation, amounting to five thousand dollars, and pays the balance to [4] Palomas, and then pays the \$5,488.11 into court; which on the face of it would look like the proper way for the trustee to do. That is about as far as I got in the file.

Mr. Mellinkoff: If your Honor please, a couple of additional facts which might throw some light on this situation are these:

The defendant Palomas Land and Cattle Company is generally referred to throughout the pleadings and the briefs as "Palomas," and this Texas law firm, of which the moving character is one Rasberry, is referred to as the "defendant law firm." In June of 1943, as appears from the affidavit filed by the plaintiff Baldwin, an award in favor of Palomas was proclaimed by the American-Mexican Claims Commission. I believe the chronology is important. That was in June of 1943.

The next chronological step is that in August of 1943, August 6th of 1943, the defendant law firm claims that defendant Palomas executed an agreement, which is in the files here, or a copy of it, under date of August 6, 1943, concerning a contingency fee in connection with this claim awarded by the

American-Mexican Claims Commission. The defendant law firm, in the affidavit of this Mr. Raspberry, likewise claims that actually there had been an oral agreement in June of 1943 covering the same matters mentioned in the letter of August, '43. However, no date is specified as to the precise day in June of [5] '43 that this alleged agreement was made. So it is not entirely clear from the affidavits, at least, exactly what the defendant law firm is relying on, whether an oral agreement or a written agreement.

The Court: If they were to the same tenor, what difference would it make? Is there any advantage in antedating their claim to June instead of August?

Mr. Mellinkoff: I think it has a bearing on the situation in connection with the question of an alleged assignment, and I am simply giving the chronology of the thing at this point.

In any event, in October of 1943, which is unquestionably subsequent to any claimed agreement by the defendant law firm with the defendant Palomas, this trust agreement was executed, and of course in the trust agreement there is no mention made of any assignment of anything to the defendant law firm.

In the voluminous affidavits which have been filed, both by the plaintiff trustee and the defendant law firm through Mr. Raspberry, there are many issues that are dragged into this thing concerning the administration of the trust, concerning what the true nature of the alleged agreement was, between the defendant Palomas and the defendant law firm. But

actually there is only one question before the court, and in two different forms it is the same question on the motion to dismiss [6] and on the order to show cause, and that question is simply this: Can the plaintiff trustee maintain an action in interpleader in this type of a situation?

The Court: Why not? You claim he is bound by the trust agreement to pay the money to your client, is that it?

Mr. Mellinkoff: That is correct.

The Court: Is that your sole argument boiled down to its essence and then dressed up?

Mr. Mellinkoff: I would say that is the heading of the argument, and there are sub points under that. Insofar as the motion to dismiss is concerned, the argument is addressed considering the complaint alone. Insofar as the order to show cause is concerned, the same argument is made, but now considering the affidavits that have been filed.

Insofar as the motion to dismiss is concerned, it appears on the face of the complaint that the trustee was obligated to pay certain moneys to the trustee's beneficiary, and that it has not paid those moneys. That is one fact that is clear from the complaint.

The Court: Well, you are talking about the moneys that you claim should have been paid to your client but instead were paid into court?

Mr. Mellinkoff: That is correct.

The Court: How does that differ from the barnyard [7] variety of interpleader involving an insurance policy? We will say I take out an insurance policy and there are trust provisions in the insur-

ance policy, the insurance company is bound, I think, to pay that money under the trust that I have created with the company, and maybe I have named somebody as beneficiary that claims to take the money, and somebody else comes in and says, "Wait a minute, I claim that money"; the insurance company has a right to come in and say, "We will hold the money, you and him fight."

Mr. Mellinkoff: If your Honor please, I think the short answer to that is that we are not here dealing with an insurance company, we are dealing with a trustee, and the duties of a trustee and the duties of an ordinary party to a contractual obligation are completely different.

Of all of the cases cited by the other parties to this action purporting to show that a trustee may maintain an action in interpleader under such circumstances as these, there is not a single case—and I have examined all of them—there is not a single case where against the objections of the beneficiary the trustee has forced his beneficiary under the trust to interplead and litigate a claim with a stranger to the trust.

The law of trust is that the trustee owes a duty of loyalty to his beneficiary, and a duty of loyalty to the trust, and the mere fact that some outsider comes in and says, [8] "Hey, I have got a claim here against the beneficiary," is not in and of itself sufficient cause for the trustee to say, "Well, now, I don't know who to pay, I am going to pay the money into court and force the beneficiary to litigate."

The Court: You say they have been able to cite no case where under the facts the trustee was successful in interpleading his beneficiary?

Mr. Mellinkoff: Against the objection of the beneficiary.

The Court: Do you have cases the reverse of the situation?

Mr. Mellinkoff: Not precisely on the point, except the case cited in the original memorandum, the Georgia case.

The Court: Can it be possible that this is one of those situations where it is so well accepted that you don't find authority on it?

Mr. Mellinkoff: I think the situation is that it is so well accepted that the trustee does not force his beneficiary to litigate that there are no cases on the subject.

The Court: In other words, your contention is it is well accepted in favor of your position?

Mr. Mellinkoff: If your Honor please, in Mr. Scott's famous treatise on trusts there are statements in that treatise to the effect that a trustee cannot safely pay out after he has received a notice of an assignment, if there is [9] such a notice of an assignment.

The Court: What Scott?

Mr. Mellinkoff: Scott on Trusts.

The Court: Austin Wakeman Scott?

Mr. Mellinkoff: Austin Wakeman Scott of the Harvard Law School, your Honor.

In that work, Mr. Scott states that if the trustee

is in doubt as to whom he should pay and feels that he is under a risk as to whom he should pay, if he pays one or the other, then he may come into court and ask for instructions. But the vital difference between such a situation and the present action is that if this action is permitted to prevail, the trustee is going to be out of this case.

If it is an action for instructions, the trustee will be a party to the litigation. But what the trustee is asking your Honor to do is to give them a complete exculpation for any of their acts in connection with these particular moneys and tell them to go hence.

The Court: How could you suffer? This trustee is not trying to deduct any moneys for expenses, is he?

Mr. Mellinkoff: If your Honor please, even though it is expressly forbidden by the trust, they are doing that in this very action. One of the items of relief that they are asking at the present time is that a reasonable charge to the present attorneys for the trustee be made a lien against [10] the moneys deposited in the registry of the court, and the trust instrument itself specifically provides that no expense will be incurred without the express written approval of the beneficiary.

The Court: That is the fee for the interpleader proceedings you are talking about?

Mr. Mellinkoff: That is correct, your Honor.

Now, again returning solely to the complaint and to the motion to dismiss in connection with the com-

plaint, the complaint on the one hand sets forth an assignment by Palomas and by the Security-First National Bank of the claims under the American-Mexican Claims award to the trustee, and they very explicitly set forth their assignment. But insofar as the claim of the defendant law firm, they don't allege that there has been any assignment. All that appears on the face of the complaint is that somebody has come up with a letter, and they don't set forth the letter in the complaint, but all they say is that pursuant to a certain letter the defendant law firm has claimed that it is entitled to receive a portion of the moneys going to Palomas.

The Court: Isn't that the ordinary situation? Plaintiff in an interpleader doesn't have to show that the claimant's cause of action is good or bad, he doesn't have to show that any legal proceeding has been instituted; all he has to show is that somebody has made a claim on that money, that he [11] is a stakeholder, that he doesn't want to get caught in the controversy, that he is willing to pay the money into court and let the people fight about it.

Mr. Mellinkoff: That is correct in the ordinary case of interpleader, which I believe this is not.

Here is a trustee who owes a duty of loyalty to his beneficiary, as set forth in our original memorandum, and under that duty of loyalty it is his duty to do everything he can for the beneficiary.

Now, were it not for the present action of the plaintiff trustee, there is nothing in any of these papers to show that there would, in fact, be litigation in this instance.

True, there is an argument as between the defendant law firm and the defendant Palomas, but there is nothing to indicate that there would be litigation.

Now, here is a trustee who is bound by a duty of loyalty to his beneficiary, who against the wishes of his beneficiary is forcing his beneficiary into court to carry on a protracted litigation.

Now, in this litigation the trustee will be absent, and if we choose to question whether or not the trustee has wrongfully dealt with the defendant law firm, if we choose to question the conduct of the trustee in the administration of this trust, that can have no effect in this litigation [12] once the trustee is removed from the action.

The Court: Aren't you building up a bogeyman there? The administration of this trust consisted only of the receipt of this money, the dividing of it in 19 parts, and the multiplying of seven or nine times 19, and a distribution. There has been no other administration of any other trust, outside of the receipt of that money?

Mr. Mellinkoff: It is precisely that phase of the administration that involves us in an argument here this morning, as becomes very apparent from the affidavit of Mr. Baldwin himself.

The argument that is made in connection with the order to show cause, as to the reason for the validity and the necessity of this interpleader action, is that here the beneficiary Palomas has made an assignment of a portion of the moneys due to

the defendant law firm, and therefore since there has been an assignment, the defendant law firm rightfully makes a claim to that money, the beneficiary says you shouldn't pay it, and therefore, interpleader.

Now, No. 1, that assignment is not pleaded in the complaint, but examining the documents involved, let us consider whether there is even a bona fide claim, which I believe is the fundament of the right to maintain interpleader, whether there is a bona fide claim of an alleged assignment of any portion of the Palomas award to the defendant law firm. [13]

Now, the fact of the matter is that both the trustee and the defendant law firm by their conduct, by their letters, which are in evidence in the affidavits filed by opposing counsel themselves, have declared that there is no assignment here, and the present claim of the trustee that there is an assignment and therefore he doesn't know how to pay out is something that has been made up for the purposes of this litigation.

Now, a couple of factual matters, your Honor: At the time that the award was originally made, the president of the defendant Palomas was a man by the name of Marshall Stephenson. His attorney at that time, both at the time of the award and prior to the award, so there was the attorney-client relationship, was this man Rasberry. Now, after the first payment, at the time the first payment became due and certain moneys were paid by the govern-

ment on the voucher of Palomas, paid to the trustee for distribution, a check was sent to Palomas for a portion of the funds due at that time. Subsequently, during the lifetime of Marshall Stephenson, a second payment became due, and this time the payment from the trustee, not from the government but from the trustee, was paid to the order of defendant Palomas and defendant law firm. It was after the second payment that Marshall Stephenson died.

Now, subsequent to the death of Marshall Stephenson and [14] before the third payment came due——

The Court: Is this the third payment that you are fighting about?

Mr. Mellinkoff: No, your Honor. This is the sixth payment.

But when the first payment came due to Palomas——

The Court: The third payment?

Mr. Mellinkoff: Yes, No. 3, after the death of Marshall Stephenson, the defendant law firm wrote a letter to the trustee. That letter is attached as Exhibit 10 to the affidavit of the plaintiff trustee.

In that letter, Exhibit 10 to the Baldwin affidavit, the present defendant Raspberry requests that when the next payment becomes due, that as a matter of convenience the amount coming to Palomas be split up into two checks, one to the defendant Palomas and one to the defendant law firm. As stated in letter, “* * * Accordingly, for convenience, we respectfully request that in disbursing the amount

due you make two checks, one for 15 per cent of the amount, payable to this firm, and one for the balance payable to Palomas * * *."

On the face of that letter it appeared that a copy of that was going to Mrs. Letha L. Stephenson, who was the widow of Marshall Stephenson. She has since remarried and is known as Mrs. Metcalf. Now, this is significant, that in [15] this letter the defendant law firm asks that the check be split and that two checks be made as a matter of convenience, not as a matter of right, because there has been an assignment made, but solely as a matter of convenience.

Now, at the same time a second letter was sent by the defendant law firm, and this is Exhibit No. 11 to the Baldwin affidavit, and this letter goes to the trustee, but is marked "Confidential." Not for the eyes of the beneficiary of the trust.

In this letter, the lawyers of Palomas say that they will be satisfied that there be two checks, one to Palomas and the other to Palomas and the law firm jointly. They don't say that they insist on two separate checks, one to Palomas and one to the law firm alone; they say they will be satisfied with the two checks, one to Palomas and one to Palomas and the defendant law firm, and they point out in this confidential letter that they want it this way so that they are going to be sure and get paid.

Now, this letter was never even allegedly transmitted to the beneficiary, and when the trustee got

this letter, this confidential letter from the attorney, the trusted attorney of the defendant Palomas, it knew at that time that this attorney Rasberry had something in mind which he was not communicating to his client, and which the trustee did not communicate to the beneficiary. [16]

The Court: You talk, Mr. Mellinkoff, as if this was a very dastardly plot of some kind. It looks to me like the ordinary dealings of an attorney who is trying to protect a fee that the firm had earned. Where is the insidious result that would flow from this thing? Palomas had only so much money coming. The firm claims 15 per cent of what Palomas got. In Stephenson's life time they got the 15 per cent. Stephenson died, and they want to be sure they get the 15 per cent in the future.

Mr. Mellinkoff: That is right. Actually, the question before the court in connection with this hearing boils down to this: Not is the defendant law firm entitled to be paid anything or not, but are they entitled to be paid directly by the trustee, or do they simply have a claim for attorney fees, the same as any other lawyer has against a client, against the client.

What they are saying now is that "We have a right to get this money directly from the trustee," and we are replying to that, your Honor, that there is no right to get this money directly from the trustee. If there is any claim, you have a claim for attorney's fees. And the fact of the matter is, your Honor, that that is precisely what the trustee re-

plied when they were told of this, and that reply is Exhibit 13 to the Baldwin affidavit, when the trustee replied to Mr. Rasberry: "You will recall that the distribution of the funds [17] is to be made in accordance with the terms of the contract of October 29, 1943," and the trustee at that time refused to make payment direct to the defendant law firm. And, as a matter of fact, Mr. Rasberry recognized that, and in his letter, which is Exhibit 14 to the Baldwin affidavit, he says, "I do, of course, recall that the distribution of the funds is to be made in accordance with the terms of the contract of October 29, 1943."

In other words, the parties here, both the plaintiff trustee and the defendant law firm, have recognized that there is no assignment here, and it can only be by virtue of an assignment that there would be any justification for a refusal by the trustee to pay the money out to its beneficiary.

Furthermore, your Honor, as to the guts of this thing, is there an assignment or not? Bearing in mind that the alleged agreement between the defendant law firm and Palomas antedated the trust agreement, what was there to assign at that time?

The Court: Wait a minute. You say the alleged assignment antedated the trust agreement?

Mr. Mellinkoff: That is correct. At the time this agreement, so-called, was made between Rasberry and Palomas, the only thing that was in existence at that time was this award that had been made in favor of Palomas by the American-Mexican Claims [18] Commission.

Now, as pointed out in our second memorandum, your Honor, if there had been an attempt to make any assignment of that claim, it would have had to be done in accordance with the provisions of Public Law 814, setting forth certain circumstances under which and procedures by which a claim under that award could be assigned. There was no assignment executed and none was intended.

Now, furthermore, as appears from the Baldwin affidavit, Mr. Rasberry himself participated in the draftsmanship in the drafting of the so-called trust agreement. Now, if at that time he had felt, and he had felt that his client recognized that there was an assignment to him of any portion of that award, it would have been a very simple matter to say that instead of 7/19ths to Security-First National and 7/19ths to Palomas, and 5/19ths to the plaintiff law firm, that Palomas' share would have been cut down and there would have been some of those 19ths going to defendant law firm.

That was a very easy matter to set up, but it was not set up because there is nothing in the conduct of the parties to show that an assignment was intended.

All of the checks that have come in up to the present moment, your Honor, have been made out either to Palomas alone, or to Palomas and its attorney. And if as the defendants now claim there was an assignment, what would have [19] been the necessity for any signature by Palomas on a check that was supposed to go to the defendant law firm?

The fact of the matter is that there was no assignment at any time, and these defendants know it, and it has only been reared at this time to give color, an attempt at color, to the claim of the right on the part of the trustee to interplead.

The Court: Now, you have said that the question involved is whether or not a trustee can interplead its beneficiary, and that may be the legal question involved. But how does this matter of whether there was an assignment enter into it?

Let's go back to the common insurance policy interpleader. An insurance company would ordinarily be protected to pay its named beneficiary. There has been no legal assignment. Somebody else makes a claim. What is the theory of interpleader? I am talking off the cuff now, because I haven't read your briefs, and I haven't read any texts on it. But it seems to me it rests on the common sense theory, why should there be litigation involving a stakeholder if somebody makes a claim on him? It doesn't make any difference whether the claim is good or bad. Let him off the hook, let him pay the money into court and let the two fellows that make claim to the money fight about it.

As I understand interpleader actions generally, it isn't [20] necessary that the party plaintiff show that somebody's claim is good; it is enough to show somebody makes a claim on him, somebody claims the money, has an interest in that situation.

Looking at the thing now, apart from statute and apart from anything else, but just common horse

sense, which in my opinion is the way a lot of cases ought to be decided, instead of getting too technical about these things, passing for the moment the power of the trustee to interplead his beneficiary, it seems to me that nobody could be hurt by an interpleader action even if there wasn't a valid assignment. The parties are before the court, here is a forum in which the Palomas Land Company and the Texas law firm can litigate a claim on this money.

Apparently you have something in mind which you hope will defeat the claim of the law firm. It is not necessary that you divulge that at this time. I don't think you would be going to this trouble unless you had something, what you consider to be a defense as to their claim of the money.

Mr. Mellinkoff: That is correct, your Honor.

The Court: But here is as good a forum as any to fight that out.

Mr. Mellinkoff: If your Honor please, I believe what your Honor has stated is indubitably the law as to matters affecting ordinary contracting parties, or the ordinary common, [21] garden variety of stakeholder who finds himself in the middle with two people making claims upon him, and some of the cases hold even though there is a contractual obligation to one party, if another party asserts a conflicting demand, that that in and of itself will not block the action in interpleader. However, your Honor, the situation is different with a trustee.

The Court: That is a point of law now. You have quoted Scott in your brief, I take it, some authorities on that point?

Mr. Mellinkoff: That is correct. That is the fundamental point of law involved.

The second point involved, and this also bears on the same thing: It is not enough sufficient to set forth the bare legal requirements of an action in interpleader to give an absolute right to the action of interpleader. If it be shown that the action is not brought in good faith, if it be shown that the person who is trying to bring the interpleader action is a wrongdoer insofar as one of the defendants is concerned, then that proposed interpleader falls.

Now, the case on that, which is cited, is the case of *Boice v. Boice*, 48 Fed. Supp., affirmed in—

The Court: Let's assume that is the law. Now how is the plaintiff, the surviving trustee, a wrongdoer, other than what you have already argued, breach of his trust agreement? [22] If your law is good on that trust theory, he might be breaching his trust agreement. But is he a wrongdoer in any other sense?

Mr. Mellinkoff: Yes, very definitely.

The Court: How?

Mr. Mellinkoff: As pointed out in the affidavit of Mrs. Metcalf, and as pointed out in the second memorandum of points and authorities, aside from this fact that he hadn't paid over this sum of over \$5,000, as I have been saying, the trustee some years ago, in 1947, when it received the so-called confidential letter at the same time it received another letter, and in the one letter, a copy of which was supposed to go to the beneficiary, there was a re-

quest for the two checks as a matter of convenience, without any claim of right, and in the second letter, a confidential letter, where it appeared that the defendant law firm was claiming some right under this thing, the trustee, again by its duty of loyalty, was bound to make a disclosure to its beneficiary, because the beneficiary had no notice that this defendant law firm claimed not only the right to be paid, but the right to an assignment or a lien upon these very funds, and this trustee at the moment it became aware of such a claim was under a duty, its duty of loyalty to its beneficiary, to say, "Look, beneficiary, here is what your trustee is trying to do." [23]

The Court: Now, wait. That spells out a nice argument.

Mr. Mellinkoff: Thank you, your Honor.

The Court: But I don't think the facts bear it out. What happened? Prior to this so-called confidential letter the plaintiff had apparently disbursed checks to Palomas and the attorneys jointly, hadn't they?

Mr. Mellinkoff: The first one was solely to Palomas.

The Court: Some time before this confidential letter there was one check in which the defendants were named, which meant their signature had to go on it.

Mr. Mellinkoff: That is correct.

The Court: Then the trustee gets this letter where the attorney says, "as a matter of conven-

ience." Well, now, you and I have practiced law, and we have had checks which belonged to our clients, where we had a contingent fee, and where we have as a matter of convenience suggested to the insurance company that the check be made to the client and the attorney. Why? So we would have some hold on that check and be able to get our fee. That is common practice. I do not see anything wrong in this letter that the attorney wrote. He says, "as a matter of convenience."

There is not even an assertion in there of a claim at that time.

Mr. Mellinkoff: Your Honor, this is precisely the [24] point. There were two letters of the same date, two letters of May 31, 1947, and the one in which this was claimed not as a matter of right, but just as convenience, that letter was supposed to have gone forward to the beneficiary. It appeared on the face of the letter: copy to Mrs. Letha L. Stephenson. But in the other letter, the confidential letter to the trustee, in which there was an indication of a claim of right, of an assignment, in that letter there was no indication that the beneficiary was notified, and the beneficiary was not notified.

The Court: That is what I am getting to. How was anybody hurt by the failure of the trustee at that time—Garfield, I guess, wasn't it?

Mr. Mellinkoff: Yes.

The Court (Continuing): —to notify the beneficiary? After all, a trustee only has to notify his

beneficiary on matters of some real moment. He doesn't have to write and tell his beneficiary of the weather. His beneficiary knew already that the attorneys were claiming some of this money. They had been named as the payee in one of the previous checks. How is there any breach, on this subject of wrongdoing by the trustee, under the theory that a wrongdoer can't interplead, how is there anything wrongful in the trustee failing to advise his beneficiary about this letter?

Mr. Mellinkoff: Simply this, your Honor: The vital [25] difference between an attorney claiming a right to be paid and an attorney claiming a lien or a mortgage, or whatever you want to call it, on specific funds.

In other words, an attempt on the part of the lawyer to take out of the hands of the client the question of payment to the attorney for the services, in which he can set up possible wrongdoing on the part of the attorney, or overreaching, or what, and an assertion on the part of the attorney that he, in fact, owns a portion of these moneys. In other words, the trustee has notice that the beneficiary's own attorney is claiming adversely to the beneficiary and says nothing to the beneficiary.

The Court: Even if that were true, I am not inclined to think that I would hold that to be wrongful conduct on the part of a trustee, even if the letter is read as a claim by the attorney that he had an interest in the money. So what? He claims an interest in the money. Do you mean a trustee

is guilty of misconduct if it doesn't then notify its beneficiary of that fact? That doesn't seem like misconduct to me.

Mr. Mellinkoff: On that, your Honor, if I might be permitted, I would like to read a short quotation from Scott on trusts, as follows:

“Chief Judge Cardozo, speaking for the New York Court of Appeals, in an often-quoted passage, [26] has said, ‘Many forms of conduct permissible in a workaday world for those acting at arm’s length are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an hour the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the disintegrating erosion of particular exceptions. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not conscientiously be lowered by any judgment of this court.’ ”

The Court: That is a very fine statement. That is undoubtedly the law. But apply that to these facts. How was there any breach of trust when the trustee failed to tell its beneficiary that there was a certain letter marked “Confidential,” in

which the attorneys, apparently, were trying to see that a separate check went to them for their part, which could only be done with the consent of your client, or that the check went jointly? [27]

Mr. Mellinkoff: Simply this, that the trustee thereby had notice, a definite notice, which its beneficiary did not have, that somebody else was making claims to the very funds that the trustee held for the beneficiary.

The Court: Do you mean to contend that the Palomas Company did not know at that time that the attorneys had a claim?

Mr. Mellinkoff: They did not know and never have known until the present action was started that there was any claim on the part of the defendant lawyers that they owned or had an assignment of a portion of those funds.

The Court: I am not concerned about that. It is conceded that the Palomas Company knew that the attorneys claimed some money due them for their services.

Mr. Mellinkoff: By way of payment, yes, your Honor.

The Court: That is on your argument of wrongdoing. What other do you have? You have the argument of violation of trust, and you have the argument of wrongdoing apart from violation of the trust, which might in itself be wrongdoing; do you have some other contention?

Mr. Mellinkoff: That is the contention, your Honor, except for the one final point, and that is

this: That under the terms of this trust the trust explicitly states that no expenses will be incurred without the prior written approval of the beneficiary; and there was no prior written approval [28] or authorization for this action, despite the statement to that effect in the verification of Mr. Baldwin, which is in error. There was no authorization for it, and under those circumstances there is no and can be no legitimate claim for attorneys' fee.

The Court: I see your point there. If you are right about that, wouldn't one answer to that be that attorneys' fees could be denied the plaintiff in interpleader?

Mr. Mellinkoff: I beg your pardon?

The Court: If you are right in that contention, wouldn't the solution to that be to deny the plaintiff any right to attorney fees on the ground that by the agreement he hadn't complied with the agreement?

Mr. Mellinkoff: That is correct.

The Court: Would that in itself prevent the interpleader?

Mr. Mellinkoff: Except a further indication of a violation of trust by a plaintiff.

If I understand interpleader correctly, your Honor, it is an equitable action, and the plaintiff seeking relief from a court of equity must come into equity with clean hands. And a trustee who blatantly goes contrary to the terms of his trust, does not come into a court of equity with clean hands, is in no position to ask relief.

The Court: How much time will you want on this? [29]

Mr. Butler: Perhaps a half hour, your Honor.

The Court: And you, Mr. Schuck?

Mr. Schuck: Just one minute. We are also defendants, your Honor. We are the law firm. I have just a comment that will take about a minute. Would you like to hear that first before the general discussion?

The Court: And you want a half hour. My point is I am wondering whether we could finish before 12:00, or whether you want some time this afternoon.

Mr. Butler: I think before 12:00 we will be finished.

The Court: I would like to adjourn about five minutes early. Let's hear from the law firm for a minute, and then your reply.

Don't be misled by my questions, counsel.

Mr. Schuck: I am not. I have had the experience before, your Honor.

May it please the court, on behalf of the defendant law firm, our position is simply this, that at this stage of the game we are not in on the merits of the case at all. It is simply a question of whether or not there has been a sufficient statement of an interpleader case here. It is true that in affidavits by my people as well as by the plaintiff's people, we did put in a substantial amount of material that goes to the merits, but that was done only because—at least as far as my side was concerned—only

because there is an affidavit by defendant Palomas in which there is an [30] outright denial that there was any assignment, and we felt we had to meet that by evidentiary material.

Now, insofar as the question before your Honor is concerned at this point, it is simply a question of whether or not there is a claim, proper claim, for interpleader.

As your Honor may have noticed, we have answered the complaint here, and we have admitted on behalf of the law firm to a right to interpleader in this case. We also have conceded that there is a right to reasonable attorney fees by the plaintiff. We request, however, that whatever discharge is entered, if your Honor so decides, it be limited to the amount of the payment in court, which I believe is the proper procedure in interpleader. The plaintiff, if he is discharged, that the discharge be limited to the sum of the amount deposited in court.

Getting to the general contentions of counsel, his essential position is that we have always taken the position consistently that there was no assignment, and further made the comment that we know it.

Well, that isn't quite right.

Also, he has taken the position that Palomas never knew that the defendant law firm made a claim of assignment.

Without going into all the details in the conduct of the parties, which is gone into in considerable detail in the affidavits, I wish to point out only one thing, your [31] Honor, which is a reference to cer-

tain income tax returns filed by defendant Palomas in the early stages.

The first payment that was made to defendant Palomas amounted to over \$177,000. As the affidavits show, both Marshall Stephenson, the president, and Mr. Rasberry, went to the bank together, they both instructed the bank to divide that fund 15 per cent to the law firm and the balance to Palomas, and the share that was paid to the law firm was over \$26,000. Palomas was required, of course, to report that on his income tax returns, and in the year 1944 made its sworn return to the federal government, and that return was signed both by Marshall Stephenson, the president, and by Letha L. Stephenson, who is Letha Metcalf now, and it stated regarding the \$26,000 paid to the defendant law firm:

“Payment made or to be made to Burges, Burges, Scott, Rasberry & Hulse upon receipt by Palomas Land and Cattle Company of cash upon account of the award, being a contingent interest assigned to them for legal services at the time the conflicting claims of the Security-First National Bank of Los Angeles were asserted — cash paid in 1943, \$26,555.38; total claim \$88,517.94.”

So it cannot be contended that Palomas did not know about the claim of assignment. [32]

I wish in that connection, also, to refer to the letters pointed out by Mr. Mellinkoff, the letter be-

ing Exhibit 10, that being the letter to Mr. Garfield, the trustee. Counsel read the second part of the second paragraph, but he did not read the first part:

“As you know, our firm is entitled to 15 per cent of the proceeds due Palomas Land and Cattle Company as attorney’s fees. * * *”

That claim was made in the letter, copy of which went to Miss Stephenson, and was not asserted in the second letter, which is implicit in the request that the checks be made jointly payable.

Those are my only comments, your Honor. I fully feel that the merits of this matter are beside the point, except as they might go to a wrongdoing on the part of the trustee. The trustee in all matters fully complied with the requests made, and which were known to Palomas Land and Cattle Company. As a matter of fact, all these checks were made payable both to Palomas and the law firm, and jointly endorsed by both. And the mere fact that the trustee at one point made out two checks, rather than one, certainly to my mind is no evidence of any misconduct, but is evidence, to my mind, of proceeding exactly in line with prior practice and with the procedure as known by the Palomas Land and Cattle Company. [33]

Thank you, your Honor.

Mr. Butler: I represent Arthur D. Baldwin, who is not only surviving trustee under the trust agreement discussed this morning, but the survivor partner of a Cleveland law firm known as Garfield,

Baldwin and Vrooman, Garfield being the son of the late President, who himself died some six weeks ago. This is the law firm and these are the trustees whom defendant Palomas now characterizes as wrongdoers guilty of conduct which verges upon fraud.

Mr. Mellinkoff pointed out that we are here discussing, one, a motion to dismiss our complaint, and, two, his opposition to our order to show cause.

First as to the motion to dismiss. He brings it under Rule 12(b)(6) of the Federal Rules of Civil Procedure, which states that failure to state a claim upon which relief can be granted is properly subject to a motion to dismiss.

12(b)(6), of course, sets forth the common law general demurrer, and by his motion he admits the truth of the allegations in our complaint. He has stated that we have not pleaded an assignment, nor have we pleaded claims by the defendant law firm and defendant Palomas.

In paragraph IV of our complaint, as well as in V and VI, we have pleaded that the trustee has been subjected to crossfires between defendant law firm, on the one hand, and defendant Palomas on the other. We have pleaded the letter agreement [34] between defendant Palomas and defendant law firm, which predated the trust agreement. We have, in turn, pleaded the conduct between these parties for a period of six years from 1943 to 1950, conduct in which all parties acquiesced until two months ago.

Apart from that, in our complaint we have pleaded, I think, the requirements for interpleader which are set forth in Section 1335 of the U. S. Code Annotated. We have pleaded, one, that these adverse claimants have diverse citizenship, defendant Palomas being a corporation resident and citizen of the State of California, the defendant law firm being individuals named and being citizens of the State of Texas. The plaintiff, on the other hand, is a citizen of the State of Ohio.

We have triangular citizenship here, and clearly within the grounds of diverse citizenship under the interpleader act.

Further, we have pleaded and have deposited sums in excess of the sum of \$500.

Next, we have come within the interpleader act as to deposits of money to which people are making claims who may claim to be entitled to those sums.

There is no requirement in the interpleader act that these defendants have already made formal demand by way of institution of a law suit, or made other demands of such nature. It is sufficient if they may claim interests in these [35] funds which we hold as a disinterested stakeholder here.

Further, we have pleaded the deposit of these sums in the registry of the court.

As I understand the federal interpleader act, those are the four essential elements to maintain an action in interpleader.

As I read the cases discussing motions to dismiss of complaints in interpleader, I find the rule to be

universal that once the essential elements spelled out in the act have been pleaded, the right to relief in interpleader is absolute.

The Court: What do you say about this? Here your client is a trustee, he is bound by a trust agreement to do certain things, and among other things one is to pay money to a named beneficiary; why should he be entitled to interplead? Why shouldn't he be required to comply with the terms of his trust and pay out the money?

Mr. Butler: We should observe this trust agreement is not a classical agreement of inter vivos trust. As Austin Scott, at whose feet I had the privilege of listening in a course in trusts, says, this is not a classical declaration of trust. We don't have beneficiaries in the usual sense of the word. We have here businessmen, men who represented claimants to an award of the Mexican-American Claims Commission, which was granted out of the expropriation of land [36] in Mexico.

This man Baldwin and his law firm, from 1923 to 1943, litigated and pressed Palomas' claims to these moneys which were ultimately awarded. Raspberry, on the other hand, and Marshall Stephenson, president of Palomas, came to an agreement about further representation. Palomas was not, in all events, at one time in this litigation clearly entitled to sums here. As we have spelled out in our affidavits, this so-called trust agreement is in compromise and in settlement of litigation instituted by the Security-First National Bank of Los An-

geles, which claimed that this defendant Palomas had no right, title or interest to those sums which it has been receiving under this award.

These three parties, seeing that their interests would best be served by settlement of the Security-First National Bank suit, came together under this document, which for lack of a better phrase was entitled "Agreement of Trust." There Baldwin, Vrooman, and Garfield were named as the three trustees. They were to collect the money, deposit it in a trust account, and then disburse it according to the terms of the settlement they arrived at.

Thus, against that background you must project the term "trust," and we say and think that possibly much of the law of trusts has nothing to do in this instance; that it is, in fact, a sort of escrow or just a pure business arrangement. [37]

But apart from that, I have researched at some length the right of a trustee to bring an action in interpleader, first, the federal practice, and I have been successful in finding four cases where in trustees' trust agreements beneficiaries and third party strangers to the trust have litigated their claims in the Federal Court.

The Court: Are they cited in your brief?

Mr. Butler: They are. Security Trust Co. v. Woodward, in a Federal District Court, 73 Supp. 667. This was an action under the interpleader act by the Security Trust Company of Rochester against a beneficiary of the trust and his wife, claiming his interest in the trust. That is cited on

page 10 of my authorities. Over on page 11, I beg your pardon.

The Court: What is the name of it, again?

Mr. Butler: Security Trust Co. v. Woodward, page 11.

The Court: Very well.

Mr. Butler: In that case the defendant wife sought to have dismissed the complaint that the trustee under a classical declaration of trust had brought in the Federal District Court stating that it held moneys of the beneficiary husband to which the wife made claims pursuant to an alimony decree. The trustee there spelled out, as we have spelled out, the four essential elements to the interpleader action, and the court, speaking of the motion to dismiss, said those facts being established, being the facts which are essential [38] in interpleader, stakeholder, trustee, may maintain interpleader in a District Court of a district in which one or more of the claimants reside. There is thus alleged all of the requisites specified in the Federal Interpleader Act.

Apart from Security Trust Co., we also have *Blackmar v. Mackay*, in which contrary to Mr. Mellinkoff's statement a remainderman beneficiary objected to a suit in interpleader filed by a trustee under a classical declaration of trust. That beneficiary remainderman stating that the complaint had failed to state a cause of action, seeking to have it dismissed.

The court again pointed out: Plead the essential

elements of interpleader, and the right is absolute. Even in this case where the plaintiff is a surviving trustee of two intervivos trusts.

Those were the two federal cases precisely on the point we have here.

There are two others where a trustee was joined as a defendant in an action.

There are a wealth of State cases permitting a trustee to file an action in interpleader in a State Court, naming as defendants the beneficiary of the trust and law firms or attorneys who seek to subject the corpus of the trust to their claims for legal fees. In California there are three such cases. [39]

The Court: Where are they cited?

Mr. Butler: On page 12 of my brief. *Van Orden v. Anderson*, 122 Cal. App. 132; *Fox v. Sutton*, 127 Cal. 515; and *Sullivan v. Lusk*, 7 Cal. App. 186.

The Court: California law controls in this case on the matter of diversity of citizenship, doesn't it?

Mr. Butler: I have some thoughts on that, your Honor.

It would appear that the interpretation, possibly, of the letter agreement between defendant law firm and the defendant Palomas ought to be interpreted according to the law of Texas. However, the right of the trustee to bring the action in interpleader here would seem to be one which the Federal Courts are resolving out of the Federal Interpleader Act without regard to the interpleader practice in the State Courts. And in that connection——

The Court: But on the matter of substantive law on the right of the trustee to interplead his beneficiary, wouldn't that be decided under California law?

Mr. Butler: I think possibly not, your Honor. It would seem to me the Federal Interpleader Act itself establishing the forum spelling out the essential elements to the action has made the law, has embodied the substantive law in that section, and once pleading those things it would seem that you are absolutely entitled to relief, and the State substantive law is of no consequence. [40]

In the cases which I have read on the subject I have found no reference to that particular problem in the opinions of the Federal and the Circuit Courts.

The Court: Does the so-called trust agreement have a provision that the trustee shall not encumber the fund or run up any expenses on it, and so forth?

Mr. Butler: The trust agreement has a common provision that the trustee shall not incur expenses without the written consent of these hard-headed businessmen who entered into this settlement agreement.

We think, however, that ought not to bar—I believe you are referring to counsel's contention that we are not entitled here to attorney's fees—that provision in this trust ought not bar our right to attorney's fees.

It is elementary in trust law that the trustee cannot incur expenses which aren't proper and ap-

propriate to the preservation of the corpus and the rights of the parties thereunder.

Pointing to the opposition to the order to show cause and the affidavits that we have filed in support, I think the court will find there in the latter half the claims made by defendant Palomas and the claims made by defendant law firm, both of whom in their crossfire directed at us have stated that "You must pay me, and if you pay the other you will be subjected to a liability."

Again it is the threat of a law suit, the possibility of [41] being twice vexed, that is the basis for the action.

The Court: I follow you there. But do you have any authority to the effect that where a trust has a provision that the trustees shall not encumber the fund or incur expenses, any authorities squarely on this question of fees for interpleader as being an encumbering of the fund?

Mr. Butler: I have none in the federal practice, and I encountered none in the state practice, the usual rule being to grant the attorney fees.

In one case, *Warner v. Florida Trust Co.*, 160 Fed. (2d) 766, the court there sustained a \$5,000 fee to attorneys for the plaintiff, the court stating that was proper in that instance.

The Court: How much money was involved?

Mr. Butler: There was there involved, I think, somewhat over \$100,000.

We have here, of course, over one million and a half dollars involved in this total award made

by the government to these parties concerned under this trust agreement.

The Court: You don't argue, do you, that if you were entitled to a fee, that your fee would be gauged on moneys that had been previously paid?

Mr. Butler: No, your Honor, we are not making that argument now. Still due and owing, I think, is probably the sum of five hundred or six hundred thousand dollars. [42]

The Court: You are not going to contend that you are entitled to a fee on that, either, are you?

Mr. Butler: We are contending here that we are entitled only to reasonable attorney fees in view of the effort to which we have been put by these contending claimants.

The Court: Your fees would be based upon the total sum of \$99,000, I would think.

Mr. Butler: We have conceded that the fees ought not, probably, exceed \$500 in this instance. We would concede that to be a reasonable attorney's fee.

The Court: Fees for any matter in the future, there might be no argument. In the future the parties might come in and would agree as to how the money would be paid, and you would have no problem.

Mr. Butler: Correct, and we have had none in the past.

We are stating that where they have forced us to bring this action, after a period of six years acquiescence in a mode of conduct, in a pattern of

payment, where they have now forced us to come into court and ask for relief, we feel it unfair that we should bear the burden of attorney fees for moneys which either one or the other is going to get.

Further contentions have been made here that—we have now covered, I think, the motion to dismiss. I am referring now to page 7 and the excerpt from *Publicity Building Realty Corporation v. Hannagan*, 139 Fed. (2d) 583, the court pointing [43] out there:

“While we shall not upon this appeal, express any opinion as to the merits of this case, we consider it important that the usefulness of the statutory remedy of interpleader, which has been greatly liberalized by the Interpleader Act of 1936 and by Rule 22 of the Federal Rules of Civil Procedure, shall not be impaired by narrow and restrictive rulings which might prevent bona fide claimants, with meritorious claims to a fund deposited by a stakeholder, from securing an adjudication of their rights. . . .”

On page 5, speaking again of the merits asserted by these claims. Much that has been said so far has gone to the merits of the subject of equitable assignment. Stating that the defendant law firm has no assignment, the defendant Palomas made no assignment, that here isn't presently in issue. As the court pointed out in *Metropolitan Life Insur-*

ance Co. v. Segaritis, 20 Fed. Supp. 739, on page 5 of my brief:

“It thus becomes clear that the jurisdiction of this court to entertain an interpleader bill does not depend upon the validity or even bona fides of the claims of the respective defendants. It is obvious that in almost every case the claim [44] of one of the parties will ultimately be determined to be invalid.”

The claim of the law firm here might be later found by the court to be without merit. On the other hand, the course of conduct might show an equitable right to the law firm and the court will direct a sum be paid it. We are not concerned with what the merits are.

The Court: I get your point.

Mr. Butler: Next, the breach of duty and the disloyalty here. Mr. Scott has again been called upon in pointing out we have been disloyal.

The Court: Did Mr. Mellinkoff also study at the feet of Austin Wakeman Scott?

Mr. Mellinkoff: He did.

Mr. Schuck: I cannot claim that distinction for myself, your Honor.

Mr. Butler: We have started on page 9 and continuing on page 10 of my memorandum set forth what I deem to be the law regarding the assignment by a beneficiary of the trust of his interest in the corpus of the trust to third parties. It is clear that the beneficiary of the trust, Palomas, can assign any part of his interest in the trust to a

third party. It is further clear that the interest of the settlor-beneficiary Palomas can be reached by a creditor. This is not a spendthrift trust. [45]

On lines 9 to 14 of my memorandum on page 10 I have taken the liberty of paraphrasing slightly Mr. Scott from his book *Scott on Trusts*, page 1195, where he stated: Where the beneficiary of a trust transfers all or part of his interest therein and the trustee with notice of such transfer makes payment or conveys the trust assets to the transferor-beneficiary in accordance with the terms of the trust, the trustee is liable to the transferee in the amount so paid or conveyed to the beneficiary.

How apt that quotation is to our situation here.

Where the beneficiary Palomas transferred or is said to have transferred part of his interest in this trust to the law firm, and we, with notice of that transfer, and we have notice from everybody, convey the trust assets to Palomas in accordance with the terms of that trust agreement, we are liable to the law firm and the amounts so paid are conveyed to the beneficiary.

The cases cited under that support the proposition. Furthermore, Scott having rewritten the Restatement of Trusts, included the same point in comment (c) of Section 226. The authorities that have been cited in opposition to this order to show cause are of interest, in that *Boice v. Boice* is the sole authority that has been brought to the court's attention by defendant Palomas to show that interpleader will not lie in this instance because of unclean hands on the part of the [46] trustee.

Boice v. Boice was a Fed. Supp. case. A husband and his brother, the husband being in matrimonial difficulties, conveyed his property to his brother on an oral trust to hold and pay the income to the husband. The brother so held. The husband and wife later became reconciled and the wife entered into an agreement releasing any claims to that money that the trustee had held under this agreement, which was a very loose sort of thing. Later they became in difficulties again, and the wife repudiated her release. Now, in that case the wife went to two courts, one in Florida and one in New Jersey, the husband went to a Florida court, both of them seeking divorce, both seeking adjudication of property rights. This trustee conveyed everything he had to the husband, as much as he could get out of his hands. He meanwhile was restrained by order of a New Jersey court from further disposing of the trust assets, in a suit which had been brought by the wife, and he was therefore subject to the judgment of the court which ordered him to pay those assets he held to the wife pursuant to a decree of the court. He, five days later, after that judgment was given, came to the Federal Court with this money and attempted to make an interpleader. The court rightly pointed out that he had been subjected to the jurisdiction of a State Court, that he had been guilty of fraud as to the wife in participating in [47] fraudulent conveyance of assets by the husband to defraud her of her rights in the matrimonial property. and sent him away.

The Circuit Court when the case went up pointed out, one, there was no diversity of citizenship which enabled the Federal Court to entertain the action in the first place, because the wife and the trustee were both citizens of New Jersey, and it is clear under the Act the action couldn't have been entertained.

Furthermore, as to the subsection of Rule 22 there was not enough money in controversy which had been deposited in court, so the Circuit Court without pointing out the fraudulent wrongdoing, lack of equity, on the part of the trustee, simply dismissed it by saying the lower court had no jurisdiction to begin with.

They have cited one Georgia case. The Georgia case is rather interesting. The Georgia practice in interpleader is contrary to that of the Federal Courts. In Georgia no bills in the nature of interpleader are allowed, only strict bills. Accordingly, both claims must come out of a common source. And as the Supreme Court of Georgia pointed out in that case, that very vital element was lacking in the facts that were there presented to it.

Furthermore, the trustee in that case, no demand had ever been made upon him by either of the parties that he sought to interplead, no demands had been made upon him as [48] trustee.

Further, as the claims arose out of different instruments, the court stated it had no jurisdiction.

The Federal Act, on the other hand, expressly states that it makes no difference if the claims do

not come out of a common source, nor that they are adverse to one another, thus allowing bills in the nature of interpleader to be entertained in the Federal Court.

So that Georgia case has no application to our facts.

He pointed out the bona fide claims aspect here, and has cited to the court *Cyclopedia of Federal Procedure*. The footnote to the sentence which he has put forth in his brief on page 5, lines 25 and 26, of his additional memo of points and authorities, the footnote in the pocket part refers to *Massachusetts Mutual Life Insurance Co. v. Edner*, 73 Fed. Supp. 300.

We refer to that in our brief on page 6 or 7. And in that case the court said that the right to interpleader under the act is not dependent upon the good faith of both claimants or on the strength of their claims.

The next case that he has cited is *American United Life Ins. Co. v. Luckman*, 21 Fed. Supp. 39, in which case the Federal Court ordered interpleader between the parties.

In conclusion, he has brought up the point of Public Law 814 regarding our failure to give notice to the Treasury [49] of an assignment, and accordingly funds paid under the Mexican-American Claims Commission are not subject to assignment.

It is rather interesting to read the entire Act. The Act provides that where a claimant has assigned a part of his claim on a contingent fee basis

to attorneys, that the amount which he can so assign is 10 per cent of the award, and only in exceptional cases would the Commission entertain petitions to increase the amount from 10 per cent.

Now, in the face of our agreement the defendant law firm asserts to be assigned 15 per cent of the Palomas claim. It is perfectly clear why these parties did not go into the assignment arrangement contemplated by 814, in which case the Treasury would have paid out to the law firm 15 per cent on a treasury voucher and would have paid out to Palomas on a treasury voucher its share under the trust agreement less 15 per cent. It was because there was no jurisdiction in the Treasury to so make those payments.

These parties agreed upon 15 per cent. Once the money is out of the Treasury and in the trust accounts the claimant can do as it will with those funds, and we point out then that Public Law 814 is in no way of import in this case.

Apart from our contentions as to the attorney fees, and we have asked that attorney fees and costs be awarded which we think to be reasonable, we have incurred costs of some [50] \$33.12 in the action, and our attorney's fees of \$500. We think there is a clear line of authority in interpleader cases which award the party interpleading attorney fees which are reasonable in view of the risk entailed, the preparation, and the amount of effort which goes into the action.

I believe as the court reads our memorandum

that the amount of effort that we have put into this is going to be apparent, and we respectfully request that if the court is going to consider together the motion to dismiss and the order to show cause and make its judgment thereon, that (1) it has ample support in the authorities, and (2) that the attorney's fees ought to be allowed.

The Court: Do you have something new or further in rebuttal?

Mr. Mellinkoff: Yes, if I could speak for a moment, your Honor.

The Court: Yes.

Mr. Mellinkoff: Addressing myself to the last point made by the gentleman first, on the question of attorney fees, I would like your Honor to bear in mind that under this trust agreement this Cleveland law firm is in itself getting 5/19ths of this total award of over \$1,000,000, and perhaps that was some consideration for the statement in there that they would not incur any expenses without the [51] written approval of the trustee.

If your Honor please, in reference to Mr. Schuck's comments about the statements contained in these income tax returns, in the first place, we regard those as confidential matters which they have no right to disclose.

The Court: How did they get possession of them?

Mr. Mellinkoff: I don't know, your Honor. I presume it was because this trusted lawyer Raspberry was the attorney for the decedent's estate,

and presumably he might have had something to do during his lifetime in connection with the preparation of them.

The Court: I take it Rasberry is not a Harvard man?

Mr. Mellinkoff: As far as I am concerned the school would have nothing to do with him, sir.

We consider it a grave breach of a fiduciary duty for such matter to be even mentioned at this time. And, further, there is nothing that they have said to indicate that such a matter was ever brought home to the trustee, in any event.

Now, in reference to the argument last made, I should like to take just a moment, your Honor, to distinguish the cases on which the plaintiff here is relying to establish the right of a trustee to interplead his beneficiary.

I made the statement in opening that not a single one of the cases cited presents a case where a trustee against the objection of his beneficiary has been permitted to maintain [52] an action in interpleader.

The Court: What page are you referring to of his brief now?

Mr. Mellinkoff: I am now referring to the cases cited commencing on page 11. *Blackmar v. Mackay* is the first one cited, a case involving the Mackay trust, and in that case there is no controversy, insofar as appears from the opinion in 65 Fed. Supp. 48, which is the citation, there is no argument there, or a case where a trustee is opposed to a benefi-

ciary. It is simply an interpleader by a trustee to get an interpretation of whether or not certain provisions of the trust instrument create a reversion or a remainder. A New York court held it to create a reversion, a Nevada court had held it to create a remainder, and here was the trustee asking, "Tell me, does this money go to the settlor under a reversion or does it go to the other party as a remainder?"

There is nothing to show litigation as between trustee and beneficiary against the wishes of the beneficiary.

The next case cited is United Building & Loan Ass'n v. Garrett, and in that case I would like to call your Honor's attention to a quotation from the case at page 462:

"Answers were filed by Troy Garrett, as successor trustee, acting on behalf of the beneficiaries of the Declarations of Trust * * *."

In other words, the interpleader action was not filed [53] by the trustee; the trustee, as is very proper, was sued as a defendant, and appeared acting for the beneficiaries of the trust.

In the case of Warner v. Florida Bank and Trust Co., which is the next case cited, to quote from the case itself at page 769:

"The suit thereupon became a contest between the life beneficiary and the remainder beneficiaries, the former asserting the invalidity of the trust, the latter, its validity."

There was no trustee involved in the picture for the reason that the trustee had died, and suit was brought trying to bring in the trustee in interpleader, and in that case the successor trustee answered refusing to qualify as trustee and refusing to defend as trustee. So there was no trustee in the case at all.

In *Security Trust Co. v. Woodward*, which is the next case cited, the beneficiary answered and cross-complained, and there is nothing in the case at all, therefore, to show that the beneficiaries in any way complained to the action, and that does not conflict in any respect with what I said before, that no cases cited were cases where over the opposition of the beneficiary the trustee has been permitted to maintain his action.

The cases cited on page 12, the great majority of them [54] are not trust cases at all, but cases involving executors and administrators. That goes for *Fox v. Sutton*, *Michigan Trust v. McNamara*, *Mulford v. Stender*, *Reppetto v. Raggio*, *Steele v. First National Bank of Mobile*, and *Cobb v. Daughtry*. And as pointed out in the *Steele* case, the *Steele* case at page 355 says the administrators are primarily concerned with charges against the estate and the proper collection of assets, and they are interested for their own protection in the proper distribution of funds involved.

In other words, there is not the same situation as between trustee and beneficiary.

In the *Van Orden* case, *Van Orden v. Anderson*,

cited at the top of the list as being a California authority on that, in that case the plain fact is that the trust had terminated and there was no trust issue involved.

That statement appears at page 141 of the opinion, where the court says, “* * * nevertheless where the purposes of the trust have been accomplished, or the trust otherwise terminated (which was clearly the situation here) * * *.”

So there is no trust there.

In *Sullivan v. Lusk*, the next California trust case cited, the trust had likewise terminated. The trustee had been allowed fees for attorneys, and the trustee brought interpleader there to decide which of two attorneys was entitled to an attorney fee after the trust was already [55] terminated and the funds distributed.

In *Leber v. Ross*, there was a situation simply where an attorney who was the escrow agent as between purchaser and vendor in carrying out his escrow instructions found himself faced with an execution issued on his funds, and he therefore interpleaded to ask what he should do in face of the execution.

In other words, there is not a single case cited, your Honor, in which the right of a trustee as against his beneficiary and against the wishes of the beneficiary is entitled to interplead the beneficiary and a stranger to the trust.

The Court: Submitted?

Mr. Butler: Does the court care for a supple-

mental memorandum on the attorneys' situation involved here?

The Court: I don't think so. If I do I will ask for it.

Mr. Butler: Thank you.

Mr. Schuck: If your Honor has any question on that income tax situation, I will argue that. I have never yet had any trouble subpoenaing income tax returns, and as far as attorney-client relationship is concerned, once there is a controversy between the attorney and the client, relative to a matter involving their agreement, certainly there is no breach of the relationship in disclosing any information bearing on the subject. I don't see where that has much [56] to do with this matter, though.

The Court: It was an interesting argument. I am going to take it under submission, and I want to look at these cases. It would not be fair to pass on this, although I have learned a good bit from this argument. Mr. Mellinkoff very frankly stated that it is a question of whether or not a trustee may interplead his beneficiary, and I think I will probably find out that that is the issue in the case, from what I have heard here today.

I regret that I was not one of the fortunate ones who had a course under Austin Wakeman Scott. I had a course under him, but it was only procedure. I did not get to such topics as trusts, as a first-year law student at Harvard.

I will try to pass on this very shortly.

(Whereupon, at 12:00 o'clock noon, court adjourned.) [57]

CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 8th day of September, A.D. 1950.

/s/ SAMUEL GOLDSTEIN,
Official Reporter.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 223, inclusive, contain the original Complaint for Interpleader; Temporary Restraining Order and Order to Show Cause; Summonses and Returns of Service; Stipulation and Order Extending Time to Plead, etc.; Notice of Motion to Dismiss; Order Shortening Time; Affidavit of Roland Rich Woolley in Opposition to Order to Show Cause; Affidavit of Letha L. Metcalf in Opposition to Order to Show Cause; Stipulation and Order

Exetending Time to Plead etc.; Answer of Defendants Louis A. Scott, et al; Memorandum of Points and Authorities of Defendants Scott, et al, in Opposition to Motion to Dismiss and in Support of Order to Show Cause; Affidavit of John L. Rasberry in Opposition to Affidavits of Roland Rich Woolley and Letha A. Metcalf in Opposition to Order to Show Cause; Statement of Reasons and Memorandum of Points and Authorities in Opposition to Motion to Dismiss Complaint for Interpleader; Affidavit of Arthur D. Baldwin in Support of Order to Show Cause; Stipulation Extending Time and Continuing Hearing on Order to Show Cause and Motion to Dismiss; Supplemental Memorandum of Points and Authorities in Support of Motion to Dismiss and in Opposition to Order to Show Cause; Additional Affidavit of Letha L. Metcalf in Opposition to Order to Show Cause; Stipulation Extending Time to File Objections to Findings of Fact, Conclusions of Law, Permanent Injunction and Orders; Objections to Proposed Findings of Fact, Conclusions of Law, Permanent Injunction and Orders; Plaintiff's Reply to Defendants' Objections to Proposed Findings of Fact, Conclusions of Law, Permanent Injunction and Orders; Letter dated July 21, 1950, to Judge Carter from Overton, Lyman, Prince & Vermille; Findings of Fact and Conclusions of Law; Permanent Injunction and Order Directing Interpleader, Discharging Plaintiff, and Allowing Attorney's Fees, Expenses and Costs; Notice of Appeal and Designation of Record on Appeal and full, true and correct copies of minute orders entered June 19 and

22 and July 25, 1950, which, together with Reporter's Transcript of Proceedings on June 19, 1950, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$3.20 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 19th day of Sept., A.D. 1950.

EDMUND L. SMITH,
Clerk.

[Seal] By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 12692. United States Court of Appeals for the Ninth Circuit. Palomas Land and Cattle Company, a Corporation, Appellant, vs. Arthur D. Baldwin, as Surviving Trustee under a Certain Agreement of Trust dated October 29, 1943, Louis A. Scott, John L. Rasberry and James F. Hulse, Partners doing business under the firm name and style of Burges, Scott, Rasberry & Hulse, Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed September 21, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Circuit Court of Appeals for
the Ninth Circuit

No. 12692

PALOMAS LAND AND CATTLE COMPANY,
a Corporation,

Appellant,

vs.

ARTHUR D. BALDWIN, as Surviving Trustee
Under a Certain Agreement of Trust Dated
October 29, 1943; and LOUIS A. SCOTT,
JOHN L. RASBERRY and JAMES F.
HULSE, Patrnrs Doing Business Under the
Firm Name and Style of Burges, Scott, Ras-
berry & Hulse,

Appellees.

APPELLANT'S STATEMENT OF POINTS ON
WHICH APPELLANT INTENDS TO RELY
ON APPEAL AND DESIGNATION OF
THE RECORD MATERIAL TO THE CON-
SIDERATION THEREOF

Comes now the Appellant Palomas Land and
Cattle Company, a corporation, pursuant to Rule
19 (6) of the Rules of the United States Circuit
Court of Appeals for the Ninth Circuit and makes
the following:

I.

Statement of Points on Which Appellant Intends
to Rely on Appeal

1. The District Court should have held as a matter of law that the plaintiff, as trustee, cannot compel the Appellant beneficiary, which claims under the trust, to interplead with a stranger to the trust, and the District Court should have dissolved the temporary restraining order, and dismissed the action.

2. The District Court should have held as a matter of law that under the terms of the trust agreement, the plaintiff trustee was prohibited from charging the trust res with expense without the consent of Appellant beneficiary, and the District Court should have denied plaintiff attorney's fees and costs.

3. The District Court erred as a matter of law in making the following orders and in making each and all of the conclusions of law upon which said orders are based:

(a) Enjoining and restraining Appellant, its agents, attorneys, servants and representatives from taking, maintaining and prosecuting against plaintiff any proceeding in any State or Federal Court based upon any of the claims of Appellant to the sum of \$5,488.11 deposited by plaintiff in the registry of the District Court;

(b) Ordering Appellant to interplead and litigate with the other defendant, Appellant's

claims and rights to said sum of \$5,488.11;

(c) Allowing and directing plaintiff's attorney's fees and costs to be paid out of said sum of \$5,488.11; and

(d) Retaining jurisdiction of the cause to determine the rights of Appellant and the other defendant in and to the balance remaining of said sum of \$5,488.11.

4. The evidence does not support and the District Court erred as a matter of law in making each and all of the following Findings of Fact:

(a) That the other defendant contends that the letter agreement dated August 6, 1943, constituted an assignment to it cognizable either in law or in equity, of 15% of all sums payable to defendant Palomas pursuant to the award and trust agreement;

(b) That the aforesaid contention of the other defendant is tenable;

(c) That plaintiff does not and never has claimed any right, title or interest in and to the sum of \$5,488.11 deposited in the registry of the District Court;

(d) That the claims of the other defendant have been asserted in good faith;

(e) That plaintiff could not safely determine for himself which claim is right;

(f) That plaintiff could not pay said moneys

to Appellant without incurring risk of liability to the other defendant;

(g) That plaintiff at the time of the commencement of this action was and since has been in danger of being harassed and damaged by the costs of litigation and risk of liability in two actions on a single obligation;

(h) That plaintiff as trustee did not commit any breach of trust by reason of the withholding of disbursement of said sum of \$5,488.11 and the deposit of the same in the registry of the District Court; and

(i) That plaintiff did not violate any fiduciary duty imposed upon him by said trust agreement by reason of the withholding of disbursement of said sum of \$5,488.11 and the deposit of the same in the registry of the District Court.

II.

Designation of the Record Material to the Consideration of the Appeal

The entire certified Record on Appeal including the transcript of proceedings.

ROLAND RICH WOOLLEY, and
DAVID MELLINKOFF,

By /s/ DAVID MELLINKOFF,
Attorneys for Appellant.

State of California,
County of Los Angeles—ss.

Isabel E. Dyson, being first duly sworn, says: That affiant is a citizen of the United States and a resident of the county as aforesaid; that affiant is over the age of eighteen years and is not a party to the within above-entitled action; that affiant's business address is 211 S. Beverly Drive, Beverly Hills, California, that on the 29th day of September, 1950, affiant served the within Appellant's Statement of Points on which Appellant Intends to Rely on Appeal and Designation of the Record Material to the Consideration Thereof on the Appellees in said action, by placing two true copies thereof in an envelope addressed to the attorneys of record for said Appellees at the office address of said attorneys as follows:

Lawler, Felix & Hall, Wm. T. Coffin and
Edward T. Butler,
800 Standard Oil Building,
Los Angeles 15, California.

Overton, Lyman, Prince & Vermille and
Carl J. Schuck,
733 Roosevelt Building,
Los Angeles 17, California.

and by then sealing said envelopes and depositing the same, with postage thereon fully prepaid, in the United States Post Office at the city where is located the office of the attorneys for the person by and for whom said service was made.

That there is a delivery service by United States mail at the place so addressed and there is a regular communication by mail between the place of mailing and the place so addressed.

/s/ ISABEL E. DYSON.

Subscribed and sworn to before me this 29th day of September, 1950.

[Seal] /s/ DAVID MELLINKOFF,
Notary Public in and for
Said County and State.

My Commission Expires Jan. 23, 1954.

[Endorsed]: Filed October 2, 1950.

No. 12692

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PALOMAS LAND AND CATTLE COMPANY, a Corporation,
Appellant,

vs.

ARTHUR D. BALDWIN, as Surviving Trustee Under a Certain Agreement of Trust Dated October 29, 1943;
LOUIS A. SCOTT, JOHN L. RASBERRY and JAMES F. HULSE, Partners Doing Business Under the Firm Name and Style of Burges, Scott, Rasberry & Hulse,
Appellees.

APPELLANT'S OPENING BRIEF.

On Appeal From the United States District Court for the
Southern District of California Central Division

ROLAND RICH WOOLLEY and
DAVID MELLINKOFF,
649 South Olive Street, Los Angeles 14, California,
Attorneys for Appellant.



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No. 12692

IN THE

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FOR THE NINTH CIRCUIT

PALOMAS LAND AND CATTLE COMPANY, a Corporation,
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ARTHUR D. BALDWIN, as Surviving Trustee Under a Certain Agreement of Trust Dated October 29, 1943; LOUIS A. SCOTT, JOHN L. RASBERRY and JAMES F. HULSE, Partners Doing Business Under the Firm Name and Style of Burges, Scott, Rasberry & Hulse,
Appellees.

APPELLANT'S OPENING BRIEF.

Jurisdictional Statement.

Action in interpleader brought by plaintiff, a citizen of Ohio, under provisions of Section 1335 of Title 28, U. S. C. A. (herein for convenience called "the Act") seeking to interplead Appellant, a California corporation, and the other defendants, citizens of Texas [Complaint par. I, Tr. pp. 2-3] with respect to the sum of \$5,488.11, deposited by plaintiff with registry of the United States District Court, Southern District of California, Central Division. [Complaint par. VII, Tr. p. 6.] Appeal taken under provisions of Section 1292(1) and Section 1294(1) of Title 28, U. S. C. A. from orders of District Court permanently enjoining prosecution of any other action against plaintiff in any other court, dismissing plaintiff from action with costs and attorney's fees, and directing interpleader.

STATEMENT OF THE CASE.

I.

Questions Raised by the Appeal.

1. MAY A TRUSTEE, ACTING AS SUCH UNDER AN UNAMBIGUOUS EXPRESS TRUST AND BY VIRTUE OF THE ATTORNEY-CLIENT RELATIONSHIP, FORCE HIS BENEFICIARY-CLIENT TO INTERPLEAD WITH A HOSTILE CLAIMANT TO THE BENEFICIARY-CLIENT'S TRUST FUNDS?

2. WHERE BOTH THE PLAINTIFF TRUSTEE IN INTERPLEADER AND THE ADVERSE CLAIMANT TO DIRECT PAYMENT OF THE TRUST FUNDS HAVE ACKNOWLEDGED THAT DIRECT PAYMENT IS IMPROPER, MAY THE CLAIM NONETHELESS BE MADE THE BASIS OF SUIT UNDER THE ACT?

3. MAY A TRUSTEE WHO FOR ALMOST THREE YEARS CONCEALS FROM HIS BENEFICIARY AN ADVERSE CLAIM TO THE TRUST FUNDS, NOW FORCE HIS BENEFICIARY TO INTERPLEAD WITH THE ADVERSE CLAIMANT?

4. WHERE SPECIFIC LANGUAGE OF AN EXPRESS TRUST FORBIDS ANY EXPENSE OR CHARGE WITHOUT PRIOR WRITTEN APPROVAL OF THE BENEFICIARY, AND THE APPLICABLE LAW BARS ATTORNEY'S FEES, MAY A TRUSTEE BRINGING AN INTERPLEADER ACTION AGAINST THE WILL OF THE BENEFICIARY BE AWARDED ATTORNEY FEES AND COSTS OUT OF THE TRUST FUND?

Appellant contends that each of the foregoing questions must be answered in the *negative*, that a negative answer to any one of the first three questions is decisive of the appeal in favor of Appellant, and that accordingly, the orders of the District Court should be reversed with directions to dissolve the injunction, dismiss the action, and order the return of the attorney's fees and costs.

II.

The Facts.¹

1. Origin of the Attorney-Client Relationship and the Trust Funds.

Plaintiff and his former and present partners have been attorneys for Appellant since some time in 1923 in connection with Appellant's claims filed with the United States Government arising from expropriation of land by the Government of Mexico. [Tr. p. 69.] Some time in 1940 the defendant John L. Raspberry² became an attorney for Appellant, and was associated "to some extent" with plaintiff in pressing said claims. [Tr. p. 70.] The president of Appellant and sole owner of its stock at this time was Marshall B. Stephenson.³ [Tr. p. 70.]

2. The Award to Appellant.

Pursuant to the Settlement of Mexican Claims Act of 1942 (56 U. S. Stat. at Large, Part 1, p. 1058, Chap. 766, Dec. 18, 1942), the General Claims Commission on June 15, 1943, published an award to Appellant totaling \$1,686,-056.00. [Tr. pp. 70, 71.] The award became final on

¹Except where otherwise specifically indicated, the facts pertinent to the determination of this appeal are taken from plaintiff's own affidavit and the exhibits attached thereto.

²The defendants "Louis A. Scott, John L. Raspberry, and James F. Hulse, Partners Doing Business Under the Firm Name and Style of Burges, Scott, Raspberry & Hulse" as well as their law firm are sometimes for convenience referred to as "the defendant Raspberry," who was the active participant in the events leading up to the present litigation.

³Stephenson was married to Letha L. Stephenson (now Letha L. Metcalf), who, upon his death May 11, 1946, became president of Appellant [Affidavit of John L. Raspberry, Tr. p. 30], and sole owner of its stock [*ibid.*, Tr. p. 39].

August 26, 1943. [Tr. p. 72.] To permit collection Appellant executed a power of attorney, which was filed with the Commission [Tr. pp. 72, 73], and on September 20, 1943, plaintiff's law firm received a U. S. Treasury check for \$480,525.96, 30% of the award. [Tr. p. 73.]

3. The Trust Agreement.

The next day, September 21, 1943, another claimant to the funds filed suit in the District of Columbia and in Los Angeles. [Tr. p. 73.] The suits were settled by the Trust Agreement dated October 29, 1943 [Tr. p. 74; Ex. No. 1, Tr. pp. 84-91], Rasberry acting as counsel for Appellant in the negotiation and preparation of the Agreement.

The vital portion of the Agreement reads as follows [Tr. pp. 86-87.]

“Palomas and Bank shall, and do hereby, assign, transfer and set over unto the Trustees all of their respective rights, titles and interests in and to said award (including all sums paid or payable on said award), in trust nevertheless, and the Trustees shall, and hereby covenant and agree to, hold the same, together with all their rights, titles and interests in and to said award (including all sums paid or payable on said award), in trust for the following purposes:

“(a) To collect, receive and receipt for all sums paid or payable on said award and the Trustees shall have full power so to do;

“(b) To promptly, upon receipt of any sums paid or payable on account of said award, disburse the same as follows:

“A seven-nineteenths (7/19ths) part to Palomas;

“A seven-nineteenths (7/19ths) part to Bank;

“The remaining five-nineteenths (5/19ths) part to Garfield, Baldwin & Vrooman, (the Trustees).⁴ Pending actual disbursement of said funds by the Trustees, as above provided, the Trustee shall maintain the same in a trust account with the Cleveland Trust Company of Cleveland, Ohio, or with some other responsible bank or trust company. The Trustees shall execute this trust without charge. No expenses shall be incurred without first obtaining the written approval of Palomas and Bank. The Trustees shall not make or permit any substitution under any power of attorney heretofore or hereafter given them to enable them to effect collection of sums payable on said award without first causing the substitute to execute an undertaking to hold all funds coming to his hands in trust for the purposes and on the terms and conditions herein set forth.”

4. Disposition of Trust Funds Before the Lawsuit.

Installments on the award as collected by plaintiff and disbursed to Appellant pursuant to the Trust Agreement have been as follows:

(A) FIRST INSTALLMENT. On December 17, 1943, plaintiff's firm made its trustee check to Appellant in the sum of \$177,035.88. [Tr. p. 100.] Of that total, Appellant paid \$26,555.38 to the defendant Rasberry's law firm. [Ex. "C" to Rasberry Affidavit, Tr. p. 53.]

(B) SECOND INSTALLMENT. On January 10, 1944, defendant Rasberry requested plaintiff's firm to make future checks payable to Appellant and Rasberry's

⁴Plaintiff's firm was originally handling the matter on a 33 1/3% contingency. [Tr. pp. 97-98.]

firm "as we have a contingent interest in the proceeds". [Tr. p. 101.] On October 25, 1945, plaintiff's firm made its trustee check to Appellant and defendant Rasberry's law firm, "its attorneys", in the sum of \$59,011.96. [Tr. p. 104.] Of that total, Appellant paid \$8,851.79 to the defendant Rasberry's law firm. [Affidavit of John L. Rasberry, Tr. p. 38.]

(C) THIRD INSTALLMENT.

(1) RASBERRY'S FIRST ATTEMPT TO GET DIRECT PAYMENT FROM TRUSTEE.

Between the payment of the Second and Third Installments, Marshall B. Stephenson died (May 11, 1946). "In connection with the obtaining of the requisite signatures [of Appellant] to the voucher to be forwarded to the Treasury Department of the United States in order to obtain said third installment" [Tr. pp. 75-76], plaintiff's law firm received in one envelope [Tr. p. 76] two letters from defendant Rasberry, which because of their impact on this litigation are reproduced here in full:

"May 31, 1947

"Dear Mr. Garfield:

"I received in due time your letter of May 26, 1947, enclosing Voucher (Form 406 Treasury Department) covering the third installment on the Palomas General Mexican Claim of 6.5%, the net proceeds of which appear to be \$104,113.96. Since Marshall's death, his widow, Letha L. Stephenson, who now lives in California, has been President of the company. However, P. W. Pogson is Vice-President and Percy W. Pogson, Jr., is Secretary-Treasurer. We were therefore able to complete the voucher at El

Paso and now enclose the same to you herewith duly executed.

“As you know, our firm is entitled to 15% of the proceeds due Palomas Land and Cattle Company as attorney’s fees. Accordingly, for convenience, we respectfully request that in disbursing the amount due Palomas Land and Cattle Company you make two checks, one for 15% of the amount, payable to this firm, and one for the balance payable to Palomas Land and Cattle Company.

“With kind personal regards and best wishes, beg to remain

“Yours sincerely,

/s/ J. L. RASBERRY,
J. L. RASBERRY.”

[Ex. No. 10, Tr. pp. 107-108.]

“May 31, 1947

“Confidential

“Dear Mr. Garfield:

“You will note my request in the attached letter that you divide the portion to which Palomas is entitled into two parts, one for our attorney’s fee of 15% and the other for the balance. We have no objection to the check evidencing our attorney’s fees being payable to Palomas Land and Cattle Company as joint payee, but we do desire our firm named as a payee therein. In support thereof, we attach hereto photostat copy of our contract with Palomas Land and Cattle Company for your records and so that you, as Trustee, are advised of our interest in the portion belonging to Palomas Land and Cattle Company. We do not anticipate any argument about the matter for our portion thereof was paid without question during

Marshall's lifetime. However, Marshall is dead and something may happen to me. *Therefore, I want to get this set up so that there is a record thereof on file with you and so that our attorney's fees can be segregated by the Trustees.*⁵

"My wife and I plan to attend the meeting of the American Bar Association in Cleveland in September of this year and we are looking forward to seeing you at this time.

"With kind personal regards and best wishes, beg to remain

Yours sincerely,

/s/ J. L. RASBERRY,
J. L. RASBERRY."

[Ex. No. 11, Tr. pp. 108-109.]

(2) THE ALLEGED EQUITABLE ASSIGNMENT TO
RASBERRY.

The alleged contract enclosed in the "Confidential" letter read as follows:

"August 6, 1943.

"Burgess, Burgess, Scott, Rasberry & Hulse, El Paso, Texas.

"Confirming our verbal agreement, the undersigned hereby employs you to prosecute and assert the claims of undersigned to any award made to undersigned under the provisions of the convention between the United States of America and Mexico, dated November 19, 1941, and Public Law 814 adopted by the 77th Congress of the United States, and to defend any claims asserted to any such award by Ben Wil-

⁵Emphasis supplied here and elsewhere in Appellant's Brief.

liams, *et al*, and the Security-First¹ National Bank of Los Angeles. Undersigned agrees to pay you for any services rendered in this connection as follows:

“1. Should the matters in controversy be settled by agreement prior to the filing of any suit by undersigned or the parties named, you shall receive 5% of any sums realized by undersigned or either of them.

“2. Should the matters in controversy be disposed of by litigation or settled by agreement after the filing of any suit or legal procedure by undersigned or the other claimants mentioned, you shall receive 15% of all sums realized by undersigned or either of them.

“3. It is understood that in arriving at your fee, any sum deducted from the award by the law firm of Garfield, Baldwin & Vrooman or ultimately allowed them for the prosecution of such claims before the Mexican Claims Commission shall not be taken into consideration in arriving at the sums realized by undersigned.

“4. It is also understood that undersigned shall pay all expenses incurred by you in the handling of this matter. including traveling expenses, telephone and telegraph bills, etc., and the fees of any out of state attorney or attorneys whom you may deem it necessary to employ for the purpose of prosecuting or defending any litigation instituted outside of the State of Texas to protect the undersigned.

“Yours very truly,

PALOMAS LAND AND CATTLE COMPANY

“By /s/ MARSHALL B. STEPHENSON,
President.

HUECO CATTLE COMPANY

“By /s/ MARSHALL B. STEPHENSON
President.

“Approved:

“BURGES, BURGES, SCOTT,
RASBERRY & HULSE,

“By /s/ J. L. RASBERRY.”

[Tr. pp. 110-111.]

(3) TRUSTEE REFUSES RASBERRY'S REQUEST FOR
DIRECT PAYMENT.

In response to Rasberry's request for direct payment, plaintiff trustee advised Rasberry under date of June 3, 1947:

“Relative to the disbursement of the proceeds of the voucher: You will recall that the distribution of the funds is to be made in accordance with the terms of the contract of October 29, 1943, by and between Palomas Land and Cattle Company, Security-First National Bank of Los Angeles, and the partnership of Garfield, Baldwin & Vrooman.” [Tr. p. 112.]

(4) RASBERRY ACKNOWLEDGES CORRECTNESS OF
TRUSTEE'S REFUSAL.

Defendant Rasberry took the Trustee's refusal of direct payment in good grace, replying on June 4, 1947:

“I do, of course, recall that the distribution of the funds is to be made in accordance with the terms of the contract of October 29, 1943. However, my confidential letter accompanying the voucher will explain our position and of course so long as Palomas Land and Cattle Company is joint payee in the check

evidencing our attorneys' fees you are taking no responsibility for the matter. In any event, we will appreciate your handling the matter in the manner suggested." [Tr. pp. 113-114.]

(5) CHECK TO APPELLANT AND RASBERRY.

On July 1, 1947, plaintiff made its first disbursement of trust funds since the death of Stephenson. On that date plaintiff sent two checks to defendant Rasberry, one payable to Appellant in the sum of \$32,604.11, the other payable jointly to Appellant and defendant Rasberry's firm, "its attorneys", in the sum of \$5,753.66, to wit, 15% of Appellant's share. [Tr. pp. 114-116.] Plaintiff's letter of transmittal made the following comment on the new plan of disposition:

"The two checks representing the Palomas Land and Cattle Company's share, are enclosed, and I trust that the manner of issuance will meet your requirements. Since the Vice President and Secretary-Treasurer signed the voucher, it might be desirable to ask that the endorsement of the check by the Palomas Land and Cattle Company carry the signatures of both of those officers on the check which has been made payable to your firm and Palomas. If you see any objection to such procedure, I shall be glad to hear from you regarding it. I am acting in Mr. Garfield's absence, and, of course, wish to do all that is necessary to insure for the disposition of the funds in accordance with the Agreement." [Tr. p. 115.]

(D) FOURTH INSTALLMENT. In transmitting the voucher for the fourth installment, defendant Rasberry wrote plaintiff in part as follows:

“As you know, our firm is entitled to 15% of the proceeds due Palomas Land and Cattle Company as attorney’s fees. Accordingly, *for convenience*, we respectfully request that in disbursing the amount due Palomas Land and Cattle Company you make two checks, one for 15% of the amount, payable to this firm and the Palomas Land and Cattle Company, and one for the balance payable to the Palomas Land and Cattle Company.” [Tr. p. 119.]

On March 4, 1948, plaintiff made its second disbursement of trust funds since the death of Mr. Stephenson and its second disbursement by two (instead of one) checks, one payable to Appellant in the sum of \$30,096.09, the other payable jointly to Appellant and defendant Rasberry’s firm, “its attorneys”, in the sum of \$5,311.08. [Tr. pp. 120-122.]

(E) FIFTH INSTALLMENT. On transmitting the voucher for the fifth installment, defendant Rasberry repeated the formula used in connection with the fourth installment, requesting two checks “*for convenience.*” [Tr. p. 125.]

On February 4, 1949, plaintiff transmitted two checks to defendant Rasberry—one payable to Appellant in the sum of \$32,102.51, the other payable jointly to Appellant and defendant Rasberry’s firm, “its attorneys” in the sum of \$5,665.14. [Tr. pp. 127-130.]

5. Dispute Over the Sixth Installment.

(A) RASBERRY'S THIRD REQUEST FOR TWO CHECKS
"FOR CONVENIENCE."

As he had done in connection with the fourth and fifth installments, defendant Rasberry requested plaintiff to make disbursement of the proceeds of the sixth installment to plaintiff in two checks, one to plaintiff and one to plaintiff and defendant Rasberry's firm jointly—this, "*for convenience.*" [Tr. p. 133.] The Pogsons, father and son, who had been executing the payment vouchers in Texas since the death of Marshall Stephenson, were now no longer officers of Appellant, and for the first time it became necessary for Mrs. Letha Metcalf (president of Appellant) personally to be consulted to obtain the requisite signatures. [Tr. pp. 134-137.] Defendant Rasberry advised plaintiff of this circumstance by letter dated January 3, 1950. [Tr. pp. 80, 81, 132-137.]

(B) APPELLANT DEMANDS PAYMENT IN ACCORD-
ANCE WITH TRUST AGREEMENT.

On January 20, 1950, plaintiff received a letter from counsel for Appellant, Roland Rich Woolley, enclosing the executed voucher for the sixth installment, and likewise a letter from Appellant directing payment to it and no other of Appellant's 7/19 share of monies under the Trust Agreement. Appellant further advised plaintiff that any sum to be paid defendant Rasberry's firm would be paid by Appellant direct and that Roland Rich Woolley was its sole legal representative. [Tr. pp. 81, 82, 138-143.]

(C) DEFENDANT RASBERRY REQUESTS CONTINUATION OF TWO CHECK DISBURSEMENT.

On January 23, 1950, defendant Rasberry asked for "consideration" from the Appellant's trustee, writing plaintiff in part:

"In view of the question raised as to our attorneys' fee, I have an idea, although Mrs. Metcalf does not so state, that she has instructed you to forward Palomas' part of the award, as well as all vouchers in the future, direct to Palomas, c/o Mr. Woolley. While I feel certain that you will do so in any event, *I respectfully request, under the circumstances, that you continue disbursing the amount due Palomas Land and Cattle Company in two checks, one for 15% of the amount, payable to this firm and Palomas Land and Cattle Company, and one for the balance payable to Palomas Land and Cattle Company. It is my plan to forward both checks to a bank in Los Angeles with instruction to deliver Palomas' part of the award upon endorsement of our check for 15%. I am afraid that if this isn't done, payment of our part will be delayed. Please also continue to send us the vouchers in order that we may in turn forward them, for I want to keep advised of the situation at all times. I feel that we are due this consideration, both because I have previously furnished you with a copy of the agreement setting apart 15% of all sums realized by Palomas to us as attorney's fees, but also because as attorney who represented Palomas, I have a lien on this award for our attorney's fees.*

"I will very much appreciate your co-operation.

"With kind personal regards and best wishes, beg to remain

Yours sincerely,"

[Tr. pp. 144-145.]

(D) FINALE.

(1) *“Equitable Assignment.”*

In a further exchange of correspondence with Roland Rich Woolley, plaintiff's firm advised that they had “construed [the alleged letter agreement of August 6, 1943 [Tr. pp. 110, 111]] to constitute an equitable assignment in the recovery of the claim. We have no other document in the form of an assignment.” [Tr. p. 152.]

(2) *Rasberry's “Demand.”*

On *February 6, 1950*, plaintiff's firm in Ohio received a letter from Defendant Rasberry in Texas [Tr. p. 83] dated *February 6, 1950*, reading as follows [Tr. pp. 155, 156]:

“Supplementing my letter of January 31, 1950, and in further response to your letter of January 26, 1950 [neither of these letters are attached to either the plaintiff's or Rasberry's affidavits] beg to formally demand that the Trustees, James R. Garfield and Arthur D. Baldwin, under no circumstances deliver our 15% part of the proceeds realized by Palomas Land and Cattle Company from the above claim to the Palomas Land and Cattle Company but, on the contrary, we must insist that our part of these proceeds be paid over and delivered to us by the Trustees.

“It is our position that the contract dated August 6, 1943, photostat copy of which has heretofore been furnished you, entitles us to the delivery of these funds direct to us.

“For your further information, Mrs. W. H. Burges, widow of our deceased partner, W. H. Burges, and Jane Burges Perrenot, daughter of our deceased partner, Richard F. Burges, as well as the surviving members of the partnership, to wit, Louis A. Scott, J. L. Rasberry and J. F. Hulse, have an interest in the 15% attorney’s fee provided for by the contract mentioned.

“With kind personal regards and best wishes, beg to remain

“Yours sincerely,”

(3) *Suit Filed.*

After a further letter from Roland Rich Woolley requesting information as to the dealings between plaintiff and the defendant Rasberry [Tr. pp. 157-161], plaintiff’s firm announced their intention of filing the present action, saying in part:

“Under the Federal Interpleader Act we could file an action in either the District Court of Los Angeles or El Paso. Recognizing Palomas Land and Cattle Company as our client and the Rasberry firm as a claimant of part of the funds of such client, we have determined to file this action in the District Court of Los Angeles.” [Tr. p. 163.]

Under date of March 13, 1950, plaintiff disbursed to Appellant its share of the sixth installment minus 15% (\$5,488.11 [Tr. pp. 164, 165], which latter sum was paid into the Registry of Court on the filing of this action March 30, 1950. [Tr. pp. 7, 9.]

Specification of Error.

1. The District Court should have held as a matter of law that Plaintiff, trustee of Appellant's funds with a fiduciary duty to pay those funds to Appellant—both under an express trust and by virtue of the relationship of attorney and client between plaintiff and Appellant—cannot withhold Appellant's funds and by filing suit under the Act, force his beneficiary and client to interplead with a hostile claimant to the trust funds.

Accordingly, the District Court erred in:

(a) Permanently enjoining and restraining Appellant from any suit against Plaintiff to recover the wrongfully withheld trust funds [Concl. of Law VI, Tr. p. 194; Injunction, par. 2, Tr. p. 198];

(b) Ordering Appellant to litigate title to Appellant's trust funds with the other defendant [Concl. of Law II, Tr. p. 193; Injunction, par. 3, Tr. p. 198];

(c) Discharging Plaintiff from the action [Concl. of Law III, Tr. p. 193, Injunction, par. 4, Tr. p. 198], refusing to dismiss the action [Injunction, par. 1, Tr. p. 198], and retaining jurisdiction of the cause [Concl. of Law IV, Tr. p. 194; Injunction, par. 6, Tr. p. 199];

(d) Finding that the withholding of the beneficiary-client's money and deposit of the same in the registry of the District Court constituted neither breach of trust nor violation of fiduciary duty. [Finding of Fact VIII, Tr. pp. 192, 193.]

2. The District Court should have found:

(a) That almost three years before filing of this suit, the other defendant requested payment of attorney's fees allegedly owing by Appellant to be made from the trust funds directly by the trustee—the same contention that is the basis of the present action;

(b) That at the time the plaintiff had the same knowledge of the alleged agreement of August 6, 1943, between Appellant and the other defendant which plaintiff had at the time of the filing of the action;

(c) That at the time, the plaintiff rejected the request for direct payment as being contrary to the Trust Agreement;

(d) That at that time, the other defendant in this action acknowledged that direct payment was improper;

(e) That the other defendant has never contended that said alleged letter agreement of August 6, 1943, constituted a legal assignment of any portion of trust funds;

(f) That plaintiff did not in fact believe that said alleged agreement constituted an equitable assignment;

(g) That the other defendant never at any time “demanded” (as distinguished from a mere “request”) direct payment of 15% of Appellant's share

of the trust funds until shortly before the suit was filed, and following an exchange of letters between plaintiff and the other defendant, neither of which letters either plaintiff or the other defendant produced in evidence.

The District Court accordingly erred in finding:

(i) That defendant Rasberry contends that the alleged letter agreement dated August 6, 1943, constituted an assignment cognizable either *in law* or in equity [Finding of Fact IV, Tr. p. 190];

(ii) That such contention is tenable [Finding of Fact IV, Tr. p. 190];

(iii) That the claims of the defendant Rasberry have been asserted in good faith [Finding of Fact VII, Tr. p. 192];

(iv) That plaintiff could not safely determine for himself which claim is right [Finding of Fact VII, Tr. p. 192];

(v) That plaintiff could not pay Appellant without incurring risk of liability to the other defendant [Finding of Fact VII, Tr. p. 192];

(vi) That plaintiff at the time of the commencement of this action was and since has been in danger of being harassed and damaged by the costs of litigation and risk of liability in two actions on a single obligation;

3. The District Court should have found:

(a) That the plaintiff-trustee had knowledge of the other defendant's claim adverse to the Appellant-beneficiary for almost three years prior to the filing of the suit;

(b) That the plaintiff-trustee concealed that knowledge and failed to inform Appellant of the adverse claim during all of that period;

(c) That such inaction on the part of plaintiff constituted a breach of his fiduciary duty to keep his beneficiary informed.

Accordingly, the District Court should have held, that having incurred an independent liability to Appellant by reason of such breach of fiduciary duty, the trustee cannot now withhold Appellant's funds and force his beneficiary to interplead with a stranger to the trust.

4. The District Court should have found that neither Appellant nor the other beneficiary of the trust ever consented in writing or otherwise to the institution of the present suit and should have held as a matter of law that the language of the trust instrument, to-wit: "The trustee shall execute this trust without charge. No expenses shall be incurred without first obtaining the written approval of Palomas and Bank," prohibited charging the trust funds with plaintiff's attorney's fees and costs of suit; that the law of California governs the award of attorney's fees, and that California law forbids an award of attorney's fees to the plaintiff in interpleader.

The District Court accordingly erred in finding that plaintiff at no time made any claim to the deposited funds [Finding of Fact VII, Tr. p. 192], and erred in awarding plaintiff attorney's fees and costs in connection with this action. [Concl. of Law V, Tr. p. 194; Injunction, par. 5, Tr. p. 198.]

ARGUMENT.

I.

Summary.

1. Trustee May Not Interplead Beneficiary and Stranger.

The fundamental duty of a trustee and attorney is loyalty to his beneficiary and client. The fundamental purpose of the law of trusts is protection of the beneficiary. That duty is violated and that purpose is subverted if the trustee-attorney is permitted to interplead his beneficiary-client with a hostile claimant to the beneficiary-client's trust funds. A trustee in honest doubt as to whom to pay may petition for instructions, in which case he remains before the Court. But, in deciding this matter of first impression, principle requires a holding that the trustee (unlike an insurer) may not abandon trust and beneficiary by forcing interpleader against the wishes of the beneficiary he is pledged to protect.

2. Action Not Brought in Good Faith.

The sole alleged justification for the interpleader is that a hostile claimant under an alleged equitable assignment claims a right to be paid *directly* by the plaintiff trustee a portion of funds admittedly payable to the beneficiary under the terms of an express trust. Yet prior to the filing of suit, the trustee refused the same claimant's request for such direct payment on the ground it would be contrary to the terms of the trust. And the hostile claimant acknowledged that direct payment was improper. Under such circumstances, the action cannot

be maintained for it cannot be said that there is any *bona fide* doubt as to the proper disposition of the funds in dispute.

3. Plaintiff Has "Unclean Hands."

In violation of his duty of communicating information to the beneficiary, the plaintiff-trustee respected the improper confidences of the adverse claimant and for almost three years concealed from the beneficiary knowledge that the beneficiary's trusted attorney was asserting an interest adverse to the beneficiary. Under such circumstances, a court of equity will not raise its hand to assist the wrongdoing trustee.

4. Award of Attorney's Fees and Costs Improper.

Where the action is improperly brought an award of attorney's fees and costs would be erroneous in any event. But in the instant case express language of the trust agreement forbids any charge or expense against the trust estate without the written consent of both beneficiaries. There is an entire absence of evidence of such consent. Finally, any right to attorney's fees of a plaintiff in federal interpleader is governed by the state law of the forum, and California law expressly bars the award.

II.

Plaintiff as Trustee of Appellant's Funds, With a Fiduciary Duty to Pay Those Funds to Appellant—Both Under an Unambiguous Express Trust and by Virtue of the Attorney-Client Relationship—Cannot Withhold Appellant's Funds and by Filing Suit Under the Act Force His Beneficiary and Client to Interplead With a Hostile Claimant to the Trust Funds.

1. Case of First Impression.

It is believed that the precise point here raised is one of first impression. Diligent research has failed to reveal any case squarely in point.⁶ It is further believed that the fundamental principle involved, to wit: The fierce loyalty required of trustee and attorney to beneficiary and client—is so far assumed in our jurisprudence, that litigation has been unnecessary to establish the rightness of Appellant's contention.

2. Distinguishable Situations.

(a) It is well established that the mere fact that the plaintiff in interpleader or in bills in the nature of interpleader is bound to one of the defendants by contractual relationship, *e. g.*, the ordinary case of the interpleading insurer, does not bar the action. It need only be stated that the parties to an ordinary contract deal at arm's length and are not burdened with the fiduciary duty of loyalty that is shouldered by the trustee and attorney.

(b) There are numerous cases of interpleader brought by *executors and administrators*. (*E. g.*, *Fox v. Sutton*,

⁶See articles in 54 Am. Jur. 437, "Trusts," Sec. 560; 152 A. L. R. 1122; 144 A. L. R. 1174; 97 A. L. R. 996.

127 Cal. 515, 59 Pac. 939 (1900).) But in such cases, the plaintiff—while bearing certain fiduciary duties to legatees or other beneficiaries of the estate—is primarily an officer of the court, deriving his authority to act from and accountable to the Court which issues him letters. As stated in one interpleader case:

“The administrators are primarily concerned with charges against the estate, and the proper collection of its assets.”

Steele, et al. v. First National Bank of Mobile, et al.,
233 Ala. 246, 171 So. 353, 355 (1936).

(c) Interpleader may be brought by a trustee against a stranger to the trust and a *consenting beneficiary*.

Security Trust Co., etc. v. Woodward, et al., 73
Fed. Supp. 667 (D. C., S. D., N. Y., 1947).

But since *volenti non fit injuria*, the problem here considered is not raised.

(d) Similarly, it would seem that interpleader may be permitted to obtain a construction of the trust instrument, where the controversy is *within the family* of trustee, settlor, and beneficiary, no question arising in such instance of the trustee's duty of loyalty to his trust as opposed to strangers.

See:

Blackmar v. Mackay, et al., 64 Fed. Supp. 48
(D. C., S. D., N. Y., 1946).

(e) Finally, there are cases of attempted interpleader by a trustee against his beneficiary and a *stranger claiming under a paramount title*. Here the asserted right of the trustee to interpleader is denied on the ground so well stated in *Campbell v. Trust Co. of Georgia, et al.*, 197 Ga. 37, 28 S. E. 2d 471, 472 (1943):

“The trustee must defend the title held by it under the trust indenture against the [adverse] claim wherever and however it is made.”

Such a situation, while strongly persuasive and closely related in principle to the instant case, is not identical—for here the assertion (erroneous though it be) is that the other defendant claims by equitable assignment from the beneficiary, who denies the claim.

3. The Federal Interpleader Act.

The Act (28 U. S. C. A., Sec. 1335) is remedial. See *Rossetti, et al. v. Hill, et al.*, 162 F. 2d 892 (C. C. A. 9th, 1947). It was not intended to change substantive legal relationships “but merely extends the jurisdiction of federal courts to the circumstances described in the Act.” (*Danville Building Assn. etc. v. Gates, et al.*, 66 Fed. Supp. 706, 709 (D. C., E. D. Ill., 1946).) Accordingly, the question of the personal incapacity of a trustee-attorney to interplead his beneficiary-client with a hostile claimant is determined not by a meeting of the jurisdictional requirements of interpleader under the Act, but by reference to the substantive law prescribing the duties of trustee and attorney to beneficiary and client.

4. Trustee's Duty of Loyalty.

(a) *"This is one of those unfortunate cases which occasionally come before me, where trustees for one purpose think it their duty to act as trustees for other persons who are not their cestuis que trust."*

Smith v. Bolden, 33 Beav. 262, 263, 55 Eng. Rep. 368, 369 (1863).

With that classic understatement, Sir John Romilly, Master of the Rolls, succinctly castigated a would-be interpleading trustee in language that is equally apropos to the plaintiff in the instant action.

The facts of the *Smith* case were these:

A trustee refused to deliver his deceased beneficiary's property to the beneficiary's administratrix as required by the trust. Reason for the refusal: There was a doubt in the trustee's mind as to whether the beneficiary had not in fact transferred the trust property to third persons by will. On being sued by the beneficiary's representative, the trustee expressed his willingness to pay the property into court upon a joinder in the action of all others having "bona fide claims."

In rejecting the trustee's proffered interpleader the Court adds to the statement above quoted:

"The rights of the legatees under Hall's [the beneficiary's] will, are quite foreign to his trusteeship. If such a course of proceeding were allowed, the whole trust fund might be frittered away in costs.

"I have no option. I must direct the defendant to pay the one-seventh to the legal personal representa-

tive of Henry Hall, and, as the defendant has been the occasion of the suit, he must pay the costs.”

Smith v. Bolden, supra, at Beav. p. 264, Eng. Rep. p. 369.

In the instant case, as in the *Smith* case, it is not questioned that under the clear language of the trust, the trustee's duty is to pay the funds to the beneficiary. [See Complaint, par. II, Tr. p. 3.] In the instant case, as in the *Smith* case, it is alleged that third parties have “bona fide claims” to the beneficiary's funds, and that the trustee is in doubt as to whom to pay. [Complaint, par. VI, Tr. p. 5.] But in this case, as in the *Smith* case, the trustee has forgotten that he is bound to the beneficiary by an inviolable fiduciary obligation paramount to personal consideration or to consideration for strangers to the trust.

“The most fundamental duty owed by the trustee to the beneficiaries of the trust is the duty of loyalty. This duty is imposed upon the trustee not because of any provision in the terms of the trust but because of the relationship which arises from the creation of the trust. A trustee is in a fiduciary relation to the beneficiaries of the trust. There are other fiduciaries such as guardians, executors or administrators, receivers, agents, attorneys, corporation directors or officers, partners and joint adventurers. *In some relations the fiduciary element is more intense than in others; it is peculiarly intense in the case of a trust. It is the duty of a trustee to administer the trust solely in the interest of the beneficiaries.* He is not permitted to place himself in a position where it would

be for his own benefit to violate his duty to the beneficiaries.”

Scott on Trusts, Vol. II, Sec. 170, p. 856 (1939).

A trustee may not delegate his trust (*Scott*, Vol. II, Sec. 171, p. 910), and he may not without permission of the Court resign as trustee. (*Scott*, Sec. 171.1, p. 910.)

To permit a trustee to shed his obligations to his beneficiary by the simple expedient of depositing the trust funds in court would be to vitiate the purpose and function of the law of trusts. If it be true, as plaintiff asserts, that at the first sign of an adverse claim, the trustee may drop his trust funds like a hot potato, and leave the beneficiary to fend for himself, the fundamental purpose of the trust relationship—protection of the beneficiary—has vanished into thin air.

Neither in Prof. Scott's definitive treatise on “The Law of Trusts” (and 1950 Supplement) above referred to, nor in Perry, “Trusts and Trustees” (7th Ed., 1929) is there claimed for the trustee the right to interplead his beneficiary with a hostile claimant. The absence of the assertion of such a right in the long history of interpleader and the longer history of the law of trusts is strong evidence of the fact that the asserted right does not exist. And for the plain reason that it is incompatible with the trustee's duty of loyalty to his beneficiary.

True it is, that if the beneficiary has effected a valid assignment of his interest in the trust, and the trustee pays the beneficiary after notice of such assignment, he will be liable to the assignee.

The trustee is not, however, left to squirm between the upper millstone of his trust obligation and the nether one of liability to the assignee. The well sanctioned right and duty of the innocent trustee in bona fide doubt as whom to pay is the petition for instructions. But in such action, unlike one in interpleader, the apprehensive trustee remains before the court and his administration of the trust is subject to scrutiny. As opposed, the trustee initiating an interpleader action, in the words of the District Judge in *Boice v. Boice, et al.*, 48 Fed. Supp. 183, 185 (D. C., D. N. J., 1943):

“ . . . deposits the leavings of the trust estate . . . with us; and desires that he may be permitted to abandon all these claimant defendants to pursue and battle with each other without his further helpful services . . . ”

The abandonment of the beneficiary implicit in the desire of the trustee to interplead him with a hostile claimant is the complete antithesis of the trust relationship.

As stated by Mr. Justice Cardozo in *Meinhard v. Salmon, et al.*, 249 N. Y. 458, 464, 164 N. E. 545, 546 (1928):

“Many forms of conduct permissible in a workaday world for those acting at arm’s length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honestly alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tra-

dition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions [citation omitted]. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court." (Quoted in *Scott on Trusts*, Vol. II, pp. 909, 910.)

(b) The foregoing argument is reinforced in the instant case, for as confessed by the plaintiff's law firm:

"Recognizing Palomas Land and Cattle Company as our client and the Rasberry firm as a claimant of part of the funds of such client, we have determined to file this action in the District Court of Los Angeles."

An attorney in possession of his client's funds holds those funds as trustee and his duties and liabilities are those of a trustee. (7 C. J. S. 976; 5 Am. Jur. 285.)

The "very high degree of fidelity and good faith" (5 Am. Jur. 285) to a client required of members of the bar, is forcefully put in 7 Corpus Juris Secundum 987:

" . . . if other parties claim the fund, nothing but an injunction will justify the attorney in withholding payment" [to the client].

III.

Both Plaintiff Trustee and the Adverse Claimant Have Acknowledged That It Would Be Improper for the Trustee to Pay Appellant's Trust Funds Directly to the Adverse Claimant and There Is Therefore Lacking a Bona Fide Basis for the Interpleader.

1. Contention of the Defendant Raspberry.

(a) It is submitted that there is a *complete* absence of support in the record for the italicized portion of the trial court's finding, reading:

"Defendant law firm contends that said letter agreement dated August 6, 1943, constituted an assignment cognizable *either at law or . . .*" etc. [Finding of Fact IV, Tr. p. 190.]

(b) In his own words, the adverse claimant contends that by the execution of said letter:

"15% of the Palomas share under the Trust Agreement . . . was assigned in equity . . ." [Raspberry Aff., Tr. p. 43.]

". . . as security for its said fee for legal services rendered defendant Palomas." [Raspberry Aff., Tr. p. 34.]

(c) And he now claims by reason of that alleged equitable assignment a right to be paid those monies, not by Appellant, but directly by the plaintiff trustee out of Appellant's trust funds:

"It is our position that the Contract dated August 6, 1943 . . . entitles us to the delivery of these funds direct to us." [Raspberry letter to plaintiff, Ex. No. 34 to Baldwin Aff., Tr. p. 156.]

2. Appeal Not Concerned With Issue on the Merits.

This appeal is not concerned with the merits of the controversy between the two defendants, to wit:

(a) Is defendant Rasberry entitled to be paid any attorney's fees by Appellant? and

(b) Does the alleged agreement of August 6, 1943, in fact constitute an equitable assignment to defendant Rasberry?

See:

U. S. et al. v. Sentinel Fire Ins. Co., et al., 178 F. 2d 217, 233 (C. C. A. 5th, 1949).

3. The Narrow Issue.

By denying plaintiff's right to bring the action at all, Appellant here asserts that at the time he filed suit:

(a) Plaintiff knew that there was not and could not be a *bona fide* claim by defendant Rasberry to direct payment by the trustee; and

(b) Plaintiff had no *bona fide* doubt as to whether he should pay his beneficiary-client's trust funds to the adverse claimant.

4. The Trustee Has Already Rejected the Precise Claim Here Made.

(a) On May 31, 1947, the defendant Rasberry requested the trustee to make direct payment:

"As you know, our firm is entitled to 15% of the proceeds due Palomas Land and Cattle Company as attorney's fees. Accordingly, for convenience, we respectfully request that in disbursing the amount due Palomas Land & Cattle Company you make two checks, one for 15% of the amount, payable to this

firm, and one for the balance payable to Palomas Land & Cattle Company.” [Tr. pp. 107-108.]

(b) At the time that letter was received by the plaintiff, plaintiff had before him the document constituting the so-called “equitable assignment.” [Aff. of Baldwin, Tr. p. 76.]

(c) And at the time this suit was filed, plaintiff had before him no other evidence of an equitable assignment than was in his possession on May 31, 1947. Thus, in reply to a request from counsel for Appellant, plaintiff’s firm advised on *February 6, 1950*:

“Recently we furnished you with a copy of a certain agreement between Palomas Land & Cattle Company and Burges, Scott, Rasberry & Hulse which we have construed to constitute an equitable assignment in the recovery of any proceeds of the claim. *We have no other document in the form of an assignment.*” [Tr. p. 152.]

(d) Despite possession of the alleged equitable assignment, the trustee rejected defendant Rasberry’s request for direct payment on the same grounds here asserted by Appellant, to wit: That such payment would be contrary to the trust. On June 3, 1947, the trustee wrote defendant Rasberry:

“Relative to the disbursement of the proceeds of the voucher: *You will recall that the distribution of the funds is to be made in accordance with the terms of the contract of October 29, 1943, by and between Palomas Land & Cattle Company, Security-First National Bank of Los Angeles, and the partnership of Garfield, Baldwin & Vrooman.*” [Tr. p. 112.]

5. The Adverse Claimant Recognized That the Claim to Direct Payment Is Improper.

In reply to the trustee's advice that direct payment, *i. e.*, by separate check, could not be made in view of the terms of the trust, defendant Rasberry wrote the trustee on *June 4th, 1947*:

"I do, of course, recall that the distribution of the funds is to be made in accordance with the terms of the contract of October 29, 1943. However, my confidential letter accompanying the voucher will explain our position and of course so long as Palomas Land & Cattle Company is joint payee in the check evidencing our attorneys' fees you are taking no responsibility for the matter. In any event, we will appreciate your handling the matter in the manner suggested." [Tr. pp. 113-114.]

Thus defendant Rasberry encouraged the trustee to make payment in a form which would give Rasberry some hold over a portion of the funds (which matter is discussed *infra* at page 38 of this brief), *but at the same time acknowledged that direct payment to him by the plaintiff was improper, and "that the distribution of the funds is to be made in accordance with the terms of the contract."*

6. The Action Is Not Brought in Good Faith.

As demonstrated above, both the plaintiff and the adverse claimant have condemned themselves by their own words. Each has stated that the trust funds are to be paid out in accordance with the terms of the trust, *i. e.*, to Appellant, the exact reverse of the alleged basis of the interpleader.

Where the plaintiff has said in effect, "I have no doubt that the adverse claim is wrong," and the adverse claimant has said in effect "I agree," must it not be conceded that an action asserting there to be such a doubt is brought in bad faith?

"If plaintiff knows to which of the claimants he can rightfully or safely pay, and thus protect himself, or if the hazard to which he conceives himself to be exposed has no reasonable foundation, he cannot maintain this equitable remedy."

Calloway v. Miles,⁷ 30 F. 2d 14, 15 (1929) (C. A. 6th);

Mutual Life Ins. Co. of N. Y. v. Egeline, et al., 30 Fed. Supp. 738, 740, 741 (1939), D. C., N. D. of Calif. N. D.;

See:

American United Life Ins. Co. v. Luckman, et al., 21 Fed. Supp. 39, D. C., S. D. of Calif. C. D. (1937).

On such a record, interpleader cannot be permitted. As stated in *Fleischmann v. Mercantile Trust Co., etc. et al.*, Md., 65 A. 2d 182, 184 (1949):

"To recognize mere fear of suit as a ground of suit would pervert equity jurisdiction from preventing to causing multiplicity of suits."

⁷Criticized in *National Fire Ins. Co. v. Sanders, et al.*, 38 F. 2d 212, 214 (1930), C. C. A. 5th, but followed in the Ninth Circuit, *Mutual Life Ins. Co. of New York v. Egeline, et al.*, *supra*.

7. Was There Ever a Bona Fide “Demand” Made Upon the Trustee?

As a matter of fact, even after defendant Rasberry felt that Appellant would insist on being paid all that was coming to it under the terms of the trust, he still did not “demand” *direct payment* from the trustee.

He *requested* the trustee to continue to disburse funds via a *joint check to Appellant and defendant Rasberry—not by separate check to defendant Rasberry*. [Letter of Rasberry, Tr. pp. 144-145.]

It was not until February 6, 1950, that defendant Rasberry made any “demands” at all—and then there was asserted for the first time a right to direct payment. [Letter of Rasberry, Tr. pp. 155-156.]

Under what circumstances was this so-called “Demand” made?

(1) The lengthy affidavit of the defendant Rasberry is completely silent with respect thereto. [Aff. of Rasberry, Tr. pp. 29-68.]

(2) The body of the lengthy affidavit of plaintiff merely recites the receipt of the letter of February 6, 1950, “from John L. Rasberry *formally* demanding” 15% of Appellant’s share of the sixth installment. [Aff. of Baldwin, Tr. p. 83.]

(3) The letter of February 6, 1950, from defendant Rasberry to plaintiff [Ex. 34 to Aff. of Baldwin, Tr. p. 155] indicates that trustee and adverse claimant corresponded with each other before there was any “*formal demanding*”:

“Supplementing my letter of *January 31, 1950*, and in further response to *your letter* of January 26,

1950, beg to formally demand . . .” [Letter of Rasberry to plaintiff’s firm, Tr. p. 155.]

The trustee, under a fiduciary duty of full disclosure to beneficiary and Court, saw fit to file an affidavit with 37 exhibits covering 97 pages of transcript, and likewise saw fit not to reveal to beneficiary or court the letters of January 26, 1950, and January 31, 1950, which would have advised of the circumstances of the Rasberry “demand.”

The adverse inference must be drawn from a failure to produce documents in the trustee’s possession.

Code of Civil Procedure, Section 1963(5)(6).

The trustee’s only advice to Appellant concerning the “demand” was that there had been a demand for a joint check to Appellant and defendant Rasberry. [Ex. 36, Tr. p. 163.] It was only by the filing of suit that the trustee ever advised Appellant of the true nature of the “adverse claim.”

8. Conclusion Re Bad Faith.

It is submitted that in view of the foregoing, it must be concluded that the suit is brought in bad faith and in violation of the trustee’s high duty of loyalty to his beneficiary. Even if it be thought that a trustee have any right to interplead his beneficiary with a hostile claimant (see Point II, Br. pp. 23 to 30), the right in principle could in any event exist, only after complete disclosure to the beneficiary, only in cases where there was a well-grounded doubt as to the trustee’s duty, and certainly only where the trustee knew that the adverse claim was asserted *bona fide*. None of these conditions exist in the present case.

IV.

In Violation of His Fiduciary Duty, the Plaintiff Trustee Concealed From the Beneficiary the Hostile Intentions of the Adverse Claimant for Almost Three Years, and May Not Now Force His Beneficiary to Interplead With the Adverse Claimant.

1. The “Confidential” Letter.

The defendant Raspberry’s original request to the trustee for direct payment (*i. e.*, separate check), on May 31, 1947 [Tr. pp. 107, 108] was stated to be “*for convenience.*” There was no assertion of a *right* to direct payment. The letter indicated on its face that a copy of the letter was going forward to the President of Appellant.

Each of the letters from defendant Raspberry to the trustee in connection with the vouchers for subsequent payment, requested joint checks—but again in each instance—“*for convenience.*” [Tr. pp. 119, 125, 133.] There was no assertion of any right to direct payment. Each of these letters indicated on their face that a copy of the letter was going forward to the President of Appellant or her personal representative.

However, accompanying the “for convenience” letter of May 31, 1947, was another and different sort of letter to the trustee, this one marked “*Confidential,*” *i. e.*, *not for the eyes of the beneficiary.* That letter [Ex. 11 to Baldwin Aff., Tr. pp. 108, 109] read as follows:

"May 31, 1947

"Confidential

Mr. James R. Garfield,
Garfield, Baldwin, Jamison, Hope & Ulrich,
1425 Guardian Building,
Cleveland 14, Ohio

Dear Mr. Garfield:

You will note my request in the attached letter that you divide the portion to which Palomas is entitled into two parts, one for our attorney's fee of 15% and the other for the balance. We have no objection to the check evidencing our attorney's fees being payable to Palomas Land and Cattle Company as joint payee, but we do desire our firm named as a payee therein. In support thereof, we attach hereto photostat copy of our contract with Palomas Land and Cattle Company for your records and so that you, as Trustee, are advised of our interest in the portion belonging to Palomas Land and Cattle Company. We do not anticipate any argument about the matter for our portion thereof was paid without question during Marshall's lifetime. However, Marshall is dead and something may happen to me. *Therefore, I want to get this set up so that there is a record thereof on file with you and so that our attorney's fees can be segregated by the Trustees.*

"My wife and I plan to attend the meeting of the American Bar Association in Cleveland in September

of this year and we are looking forward to seeing you at this time.

“With kind personal regards and best wishes, beg to remain

“Yours sincerely,

/s/ J. L. RASBERRY,
J. L. RASBERRY.”

This “confidential” letter plainly indicated to the trustee:

(i) That Appellant’s *attorney* was communicating matters to Appellant’s *trustee* and *attorney* which (a) affected the beneficiary and client, and (b) were intended to be concealed from the beneficiary and client;

(ii) That the trustee was being asked to participate in a scheme by the other attorney “to get this set up”, to make “a record” for the other attorney to use against the beneficiary, certainly not for the beneficiary; and

(iii) That the trustee was being asked to have the fees of the other attorney “segregated by the trustee”, *i. e.*, that the beneficiary’s other attorney was asserting some claim to a portion of the beneficiary’s funds.

While the trustee rejected the claim for direct payment [Tr. p. 112], he gave no indication to his beneficiary of the hostile intentions of the beneficiary’s trusted lawyer.

Again, under date of June 4, 1947, the trustee received further notice that the beneficiary's other attorney had assumed a position adverse to the beneficiary-client, and was again being asked to assist the attorney—not the beneficiary:

"I do, of course, recall that the distribution of the funds is to be made in accordance with the terms of the contract of October 29, 1943. However, my confidential letter accompanying the voucher will explain our position and of course so long as Palomas Land and Cattle Company is joint payee in the check evidencing our attorneys' fees you are taking no responsibility for the matter. In any event, we will appreciate your handling the matter in the manner suggested.

"If you have not received the voucher by the time you receive this letter, advise me, and I will undertake to trace the original letter and voucher." [Rasberry's letter to plaintiff's firm, Tr. pp. 113-114.]

In response to this letter, while still refusing to make direct payment of the beneficiary's funds to defendant Rasberry, the trustee issued a joint check to Appellant and defendant Rasberry in the amount of the claimed attorney's fees,

"The two checks, *representing the Palomas Land & Cattle Company's share*, are enclosed, and I trust that the manner of issuance will meet *your requirements*." [Plaintiff's letter to Rasberry, Tr. p. 115.]

2. Duty of Plaintiff Trustee to Inform Appellant Beneficiary.

Having obtained information that the Appellant's attorney (Rasberry) was acting in his own interest rather than in the interest of the client-beneficiary, and made aware by the "Confidential" letter that this adverse attitude was concealed from the beneficiary, it was the immediate duty of the trustee to communicate this knowledge to the Appellant beneficiary-client. As put in the Restatement of the Law of Trusts, Vol. I, Sec. 173 "*Duty to Furnish Information*," Comment d, p. 448:

"Even if the trustee is not dealing with the beneficiary on the trustee's own account, he is under a duty to communicate to the beneficiary material facts affecting the interest of the beneficiary which he knows the beneficiary does not know and which the beneficiary needs to know for his protection in dealing with a third person with respect to his interest . . ."

Having failed in that duty, the trustee—under an independent liability to his beneficiary for breach of trust—does not enter this Court or the District Court with clean hands, and the powers of a court of equity will not be exercised on his behalf.

Boice v. Boice, et al., 48 Fed. Supp. 183, 186, D. C., D. N. J. (1943); aff'd 135 F. 2d 919, C. C. A. 3rd (1943).

V.

The District Court Erred in Awarding Plaintiff Attorney's Fees and Costs for the Reason That:

- (1) Explicit Language of the Trust Agreement Prohibits Plaintiff From Charging the Trust With Any Expense; and
- (2) The Applicable Law Prohibits an Award of Attorney's Fees.

1. The Provisions of the Trust Agreement Reading: "The Trustees Shall Execute This Trust Without Charge. No Expenses Shall Be Incurred Without First Obtaining the Written Approval of Palomas and Bank," Bars an Award of Attorney's Fees or Costs to the Plaintiff.

Not one shred of evidence was presented to the District Court indicating that either—let alone both—of the two beneficiaries of the trust—Appellant and the Security-First National Bank of Los Angeles—had consented in writing or otherwise to an award to plaintiff of attorney's fees and costs out of the trust *res*. Appellant's president stated that no consent had ever been given to the institution or maintenance of the action and that the same constituted a breach of the trust agreement. [Aff. of Metcalf, Tr. p. 18.] The above quoted terms of the trust [Tr. p. 86] positively forbid any expense or charge against the trust, and:

"It is the duty of the trustee to conform strictly to the directions contained in the trust instrument . . ."

That the provision of the trust agreement barring charge or expense was judiciously and not unreasonably arrived at is indicated by the fact that the trustee himself under the agreement is to receive 5/19ths [Tr. p. 86] of an award totaling \$1,686,056.00. [Tr. pp. 70, 71.]

The award of attorney's fees and costs is plainly contrary to the law which the parties have made for themselves, *i. e.*, the trust agreement.

2. The Applicable Law Prohibits an Award of Attorney's Fees.

(a) LAW OF THE FORUM GOVERNS.

There is nothing in the Act (28 U. S. C. A. Sec. 1335) itself which confers a right to attorney's fees to the interpleader. And even if it were thought that the language of the trust were not controlling, the applicable law nonetheless bars the award.

The rule of *Erie Railway Company v. Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 (1938), has been interpreted in *Guaranty Trust Co. v. York*, 326 U. S. 99, 89 L. Ed. 2079, 65 S. Ct. 1464 (1945), to require federal courts administering equitable remedies to follow state decisions affecting such remedies.

Accordingly, it is held that in actions under the Act, a federal court is bound to deny attorney's fees to the interpleader where the state law of the forum denies such an award.

Danville Bldg. Assn. of Danville, Ill. v. Gates, et al.,
66 Fed. Supp. 706, D. C., E. D. Ill. (1946);

Ill. Bankers Life Assur. Co. v. Blood, et al., 69 Fed.
Supp. 705, 707, D. C., N. D. Ill., E. D. (1947).

The reason for the rule is well stated in the *Danville* case, *supra*, at page 709. In denying attorney's fees to the interpleader, the Court states:

"We are not dealing with a federal right. We are dealing with the rights of citizens in Illinois where the State rule denies the allowance of attorneys fees. No federal question is involved. This Court has jurisdiction of the suit merely because congress has seen fit to extend the jurisdiction to cases defined by the Act."

(b) LAW OF THE FORUM BARS ATTORNEY'S FEES.

The state law of the forum in the instant case bars any award of attorney's fees to the plaintiff in interpleader.

The California rule is stated in *Pacific Gas and Electric Co. v. Nakano, et al.*, 12 Cal. 2d 711, 715, 87 P. 2d 700 (1939):

"It is well settled in this state that an allowance of an attorney's fee in favor of a plaintiff in an interpleader action is improper and is without authority of law."

3. Conclusion Re Attorney's Fees and Costs.

(a) If, as Appellant contends, the entire action is improperly brought, clearly no attorney's fees or costs may be awarded; and

(b) Further, the law the parties created for themselves—the express terms of an express trust—bars attorney's fees and costs; and

(c) In any event, the applicable State law bars attorney's fees to the interpleader.

VI.

Conclusion.

The courts must be vigilant to defeat every attempt to lower the high standards of conduct required of trustees. The intense duty of loyalty owed by the trustee to his beneficiary is inconsistent with the plaintiff's endeavor to abandon his beneficiary and force interpleader with a hostile stranger. Especially is this true where there is no *bona fide* doubt as to the rightful disposition of the trust funds, the trustee and adverse claimant having conceded that the claim is improper. The impropriety of the interpleader in the instant case is further demonstrated by the action of the trustee in co-operating with the adverse claimant to conceal the adverse claim for almost three years. Finally, attorney's fees and costs are emphatically barred by the terms of the trust, and an award of attorney's fees to the plaintiff in interpleader is expressly forbidden by the applicable California law.

The judgment should be reversed with directions to dissolve the injunction, dismiss the action, and order the return of the attorney's fees and costs.

Respectfully submitted,

ROLAND RICH WOOLLEY and
DAVID MELLINKOFF,

Attorneys for Appellant.

No. 12692.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PALOMAS LAND AND CATTLE COMPANY, a corporation,

Appellant,

vs.

ARTHUR D. BALDWIN, as Surviving Trustee Under a
Certain Agreement of Trust Dated October 29, 1943;
LOUIS A. SCOTT, JOHN L. RASBERRY and JAMES F.
HULSE, Partners Doing Business Under the Firm Name
and Style of Burges, Scott, Rasberry & Hulse,

Appellees.

BRIEF OF APPELLEE ARTHUR D. BALDWIN.

On Appeal From the United States District Court for the
Southern District of California Central Division

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OCT 15 1950

FALLON O'BRIEN,

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No. 12692.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PALOMAS LAND AND CATTLE COMPANY, a corporation,
Appellant,

vs.

ARTHUR D. BALDWIN, as Surviving Trustee Under a
Certain Agreement of Trust Dated October 29, 1943;
LOUIS A. SCOTT, JOHN L. RASBERRY and JAMES F.
HULSE, Partners Doing Business Under the Firm Name
and Style of Burges, Scott, Rasberry & Hulse,
Appellees.

BRIEF OF APPELLEE ARTHUR D. BALDWIN.

Statement of Pleadings and Facts Upon Which It Is
Contended That the District Court Had Jurisdic-
tion and That This Court Has Jurisdiction Upon
Appeal.

This is an action in interpleader brought by appellee,
Arthur D. Baldwin,¹ a resident and citizen of Ohio, as
surviving trustee under a certain deed of trust dated
October 29, 1943, seeking to interplead appellant Palomas
Land and Cattle Company, a California corporation,² and

¹Appellee Arthur D. Baldwin will be hereinafter sometimes re-
ferred to, for the sake of brevity, as appellee Baldwin.

²Palomas Land and Cattle Company, a corporation, will be herein-
after sometimes referred to, for the sake of brevity, as appellant.

appellees Louis A. Scott, John L. Rasberry and James F. Hulse, partners doing business under the firm name and style of Burges, Scott, Rasberry & Hulse,³ each residents and citizens of Texas, with respect to the sum of \$5,488.11 [Compl. par. I; Tr. pp. 2, 3] deposited by appellee Baldwin with the registry of the United States District Court, Southern District of California, Central Division [Compl. par. VII; Tr. p. 6]. Appellant and appellee Rasberry each have demanded and claimed the right to payment from appellee Baldwin of said sum of \$5,488.11 [Compl. par. IV; Tr. p. 4; Tr. pp. 81, 82; Ex. 29 of appellee Baldwin's affidavit; Tr. pp. 140-143; Ex. 34 of appellee Baldwin's affidavit; Tr. pp. 155-156]. Appellee Baldwin has never claimed any right, title or interest in and to said \$5,488.11 [Compl. par. VI; Tr. p. 5]. No answer was served or filed by appellant in said interpleader action up to and including the time this appeal was perfected.

The jurisdiction of the United States District Court, Southern District of California, Central Division, existed by virtue of Section 1335, Title 28, U. S. C. A., and Rule 22, Federal Rules of Civil Procedure, Title 28, U. S. C. A. The jurisdiction of this Court exists by virtue of Section 1291 and Section 1294(1), Title 28, U. S. C. A., and by virtue of Rule 73, Federal Rules of Civil Procedure, Title 28, U. S. C. A.

³Said appellees will be hereinafter sometimes referred to, for the sake of brevity, as appellee Rasberry.

SUMMARY OF THE ARGUMENT.

I.

Appellee Baldwin Is Entitled to Relief Under the Federal Interpleader Act as Set Forth in Section 1335, Title 28, U. S. C. A.

1. Jurisdictional facts are not controverted.
2. As jurisdictional facts prescribed by Section 1335, Title 28, U. S. C. A., have been established, appellee Baldwin's right to relief is absolute.
3. Appellee Baldwin's right to relief is not dependent upon validity or bona fides of the claims of the respective adverse claimants.
4. Appellee Baldwin has at all times acted in good faith towards appellant.
5. The label of trustee placed upon appellee Baldwin and others since deceased, by the October 29, 1943 agreement, does not deprive appellee Baldwin of the right to relief under the Federal Interpleader Act.

II.

The District Court Did Not Err in Awarding Appellee Baldwin Attorneys' Fees and Costs.

1. The language of the trust agreement does not prohibit an award of attorneys' fees and costs.
2. The applicable law in regard to appellee Baldwin's right to recover costs and attorneys' fees is federal law. The case of *Erie R. Co. v. Tompkins*, 304 U. S. 64, is not applicable where one is seeking equitable relief under a federal statute which creates a federal equitable right.

3. Historically, federal equity jurisprudence has permitted an award of costs and attorneys' fees to the plaintiff in an action of interpleader.

4. If federal equitable principles are not applicable in a determination of appellee Baldwin's right to recover costs and attorneys' fees in an action brought under the Federal Interpleader Act, nevertheless the state law of California has permitted recovery of attorneys' fees and costs by a trustee who has filed an action of interpleader.

5. Even if California law does not permit the recovery of attorneys' fees in an interpleader action, the failure of the trial court to apply California law may not be assigned as error for the first time on appeal.

III.

Appellant Has Violated Rule 75(e) of Federal Rules of Civil Procedure, Title 28, U. S. C. A., and, Whatever the Decision on This Appeal, Should Be Required to Bear the Costs Incurred by Such Violation.

IV.

Conclusion.

ARGUMENT.

I.

Appellee Baldwin Is Entitled to Relief Under the Federal Interpleader Act as Set Forth in Section 1335, Title 28, U. S. C. A.

1. Jurisdictional Facts Are Not Controverted.

The jurisdictional facts as set forth in appellee Baldwin's complaint [Compl. Pars. I, IV, VII; Tr. pp. 2-6] and as supported by said appellee's affidavit are not controverted. The complaint alleges and said affidavit substantiates that:

A. Appellee Baldwin, at the time of filing his action of interpleader on March 30, 1950, had in his possession and under his control a sum of money in excess of \$500.00, to-wit, \$5,488.11;

B. At the time of and prior to filing said action appellant and appellee Rasberry, citizens of California and Texas, respectively, each demanded payment of and claimed to be entitled to the whole of said sum of \$5,488.11;

C. With the filing of this action appellee Baldwin deposited the whole of said sum into the registry of the trial court.

2. As Jurisdictional Facts Prescribed by Section 1335, Title 28, U. S. C. A., Have Been Established, Appellee Baldwin's Right to Relief Is Absolute.

A bill in interpleader involves two successive steps: The first between the plaintiff and the defendant claimants as to whether the plaintiff is entitled to force the defendants to interplead; the second between the adverse

claimants on their conflicting claims to the fund deposited by the plaintiff.

Girard Trust Co., et al., v. Vance, et al. (D. C. E. D. Pa., 1946), 5 F. R. D. 109, 114.

Here we are only concerned with the first step. There has been no trial of the conflicting claims to the fund.

Appellee Baldwin has brought his action of interpleader pursuant to the Federal Interpleader Act [Compl. Par. I; Tr. p. 2]. He was not before the trial court nor is he before this Court seeking relief under a state-created right, and

“It is well settled that ‘the party who brings a suit is master to decide what law he will rely on.’”

Fielding v. Allen (C. C. A. 2, 1950), 181 F. 2d 163, 166.

In contrast to the rules applicable to bills of interpleader followed by many state courts (see 48 C. J. S. pp. 49-54 and cases cited therein) the Federal Interpleader Act permits one to maintain an action of interpleader,

“ . . . although the titles or claims of the conflicting claimants do not have a common origin, or are not identical, but are adverse to and independent of one another.”

U. S. C. A., Title 28, Section 1335.

As has been previously stated by this Court:

“ . . . the interpleader statute was intended to afford a remedy in situations where interpleader had previously been unavailable.”

Rossetti, et al., v. Hill, et al. (C. C. A. 9, 1947), 162 F. 2d 892, 893.

In enforcing an equitable right created by federal statute the federal courts must apply their own principles of equity jurisprudence.

2 *Moore's Fed. Practice*, 2d Ed., Section 2.09, page 456;

Holmberg v. Armbrrecht, 327 U. S. 392, 394, 395.

In *Holmberg v. Armbrrecht*, *supra*, discussing equitable principles to be followed, in an action which was brought under a federal statute, the Supreme Court stated on page 394:

“ . . . in the York case we pointed out with almost wearisome reiteration, in reaching this result, that *we were there concerned solely with State-created rights*.⁴ . . . The considerations that urge adjudication by the same law in all courts within a State when enforcing a right created by that State are hardly relevant for determining the rules which bar enforcement of an equitable right created not by a State legislature but by Congress.”

And again on page 395:

“We do not have the duty of a federal court, sitting as it were as a court of a State, to approximate as closely as may be State law in order to vindicate without discrimination a right derived solely from a State. *We have the duty of federal courts, sitting as national courts throughout the country, to apply their own principles in enforcing an equitable right created by Congress.* . . .”

⁴Emphasis here and elsewhere in this brief is appellee Baldwin's unless otherwise noted.

Uniformly since 1936 the federal courts, *in determining a plaintiff's right to interplead defendants with adverse claims under the Federal Interpleader Act* have properly applied the principles of federal equity jurisprudence and have interpreted such act without applying state law.⁵

In so doing Federal Courts have held that, once the essential and jurisdictional facts as prescribed by Section 1335, Title 28, U. S. C. A., have been established, the right to relief under said section is absolute,

Railway Express Agency v. Jones (C. C. A. 7, 1939), 106 F. 2d 341, 344;

Federal Life Ins. Co. v. Tietz (C. C. A. 7, 1942), 131 F. 2d 448;

and a trial court does not have the right to decline to exercise the jurisdiction conferred upon it by said Section 1335. As one Court aptly stated:

"We consider it important that the usefulness of the statutory remedy of interpleader, which has been greatly enlarged by the Interpleader Act of 1936 and by Rule 22 of the Federal Rules of Civil Procedure, should not be impaired by narrow and restrictive rulings. In such cases where jurisdiction clearly appears, *Federal District Courts do not have the right to decline to exercise that jurisdiction . . .*"

Maryland Casualty Co. v. Glassell-Taylor & Robinson (C. C. A. 5, 1946), 156 F. 2d 519, 524.

⁵Appellee Baldwin in this brief is not attempting to present any argument as to which equitable principles the Federal Court should apply when the second step of an interpleader action is before it for determination.

3. Appellee Baldwin's Right to Relief Is Not Dependent Upon Validity or Bona Fides of the Claims of the Respective Adverse Claimants.

Although it admits that this appeal is not concerned with the merits of the controversy between the rival claimants (App. Br. p. 32), appellant had devoted a large amount of space in its brief to an attempt to show that:

1. Appellee Raspberry's claim is not bona fide;
2. Appellee Baldwin knew that said claim is not bona fide (App. Br. pp. 32-37).

It is submitted that it is wholly immaterial on this appeal whether appellee Raspberry's claim is bona fide or not.

The purpose of the Federal Interpleader Act is to protect the stakeholder as much from the vexation and costs of defending two or more lawsuits as from the danger of double liability. The language from the following cases clearly illustrate this purpose.

"It is argued that the claim asserted by the defendant Higgins is 'baseless.' We may assume, for purpose of discussion only, that his claim rests upon tenuous grounds but this assumption would not justify a dismissal of the present complaint. . . . *The mere fact that the claim of one of the claimants may be without merit, the usual situation, will not defeat the right of the stakeholder to invoke the remedy intended for his protection.*"

First Nat. Bank of Jersey City v. Fleming (D. C. N. J., 1950), 10 F. R. D. 159, 160.

"I conclude then that the rule of law is that if a disinterested stakeholder has knowledge that there are two or more persons who have (or dependent upon

the determination of a question of law may have) an interest in the fund—that *even though the stakeholder may be reasonably certain that one of the claims is meritorious and the others are not—that the stakeholder may rid himself of the vexation and expense of defending what he may think is the non-meritorious claim by filing interpleader.*”

Massachusetts Mut. Life Ins. Co. v. Weinress (D. C. N. D. Ill., 1942), 47 Fed. Supp. 626, 633.

To the same effect are:

Metropolitan Life Ins. Co. v. Segaritis (D. C. Pa., 1937), 20 Fed. Supp. 739, 741;

Hunter v. Federal Life Ins. Co. (C. C. A. 8, 1940), 111 F. 2d 551, 556;

Harris v. Travelers Ins. Co. (D. C. Pa., 1941), 40 Fed. Supp. 154, 157.

4. Appellee Baldwin Has at All Times Acted in Good Faith Towards Appellant.

In view of appellant's accusations of bad faith, appellee Baldwin deems it appropriate to review briefly each party's actions with regard to the assignment by appellant to appellee Raspberry of a portion of its award made pursuant to the settlement under the Mexican Claims Act of 1942 (56 U. S. Stat. at Large, Part 1, p. 1058, ch. 766, December 18, 1942), for legal services rendered in connection with such award.

A. *The letter agreement of August 6, 1943.* By a letter agreement dated August 6, 1943 [Tr. p. 32] appellant hired appellee Raspberry to “prosecute and assert the claims of appellant to any award . . . and to defend any claims asserted to any such award by Ben Williams, *et al.*,

and the Security-First National Bank of Los Angeles” and agreed that “should the matter be disposed of by litigation or settled by agreement after the filing of any lawsuit or legal procedure by undersigned or other claimants mentioned, you shall receive 15% of all sums realized by undersigned . . .” [Ex. 12 of appellee Baldwin’s affidavit; Tr. p. 110.]

Thereafter, on September 18, 1943, and September 22, 1943, two legal actions were filed by Security-First National Bank of Los Angeles against appellant contesting the right of appellant to said award [Tr. pp. 32-33]. These suits were settled by the trust agreement dated October 29, 1943 [Tr. p. 74; Ex. 1 of appellee Baldwin’s affidavit; Tr. pp. 84-91; App. Br. p. 4].

Appellee Rasberry contends that the letter agreement of August 6, 1943, constituted an assignment of 15% of the award payable to appellant under the terms of said trust agreement [Tr. p. 34]. *Appellant admitted by affidavits duly notarized and attached to returns filed with the United States Treasury Department on or about March 14, 1944, that such letter agreement of August 6, 1943, constituted an assignment to appellee Rasberry for legal services* [Tr. pp. 35-37; Exs. D and E of appellee Rasberry’s affidavit; Tr. pp. 54-55]. However such letter agreement of August 6, 1943, was never brought to the attention of appellee Baldwin either by appellant or appellee Rasberry until May 31, 1947, when appellee Rasberry enclosed a photostatic copy of said letter agreement in a letter written to James R. Garfield⁶ [Tr. p. 76; Ex. 11 of appellee Baldwin’s affidavit; Tr. pp. 108-109].

⁶James R. Garfield, since deceased, was a partner in the practice of law with appellee Baldwin and was one of the trustees named in the October 29, 1943, trust agreement.

B. *Conduct of the parties on and subsequent to May 31, 1947.* By letter dated May 31, 1947, appellee Rasberry advised appellee Baldwin that *he was entitled to 15% of the proceeds due appellant* as attorneys' fees and requested appellee Baldwin to issue two checks in disbursing the amount due appellant under the October 29, 1943, trust agreement. *Copy of this letter was forwarded to Mrs. Letha L. Stephenson and Mr. W. P. Pogson, Jr., the president and secretary-treasurer, respectively, of appellant* [Ex. 10 of appellee Baldwin's affidavit; Tr. pp. 107-108]. Enclosed in said letter was a so-called confidential letter and a copy of the letter agreement dated August 6, 1943 [Exs. 11 and 14 of appellee Baldwin's affidavit; Tr. pp. 108-109, 113-114].

The so-called confidential letter, also dated May 31, 1947, advised appellee Baldwin that appellee Rasberry still desired appellee Baldwin to issue two checks in disbursing the amount payable under the October 29, 1943, trust agreement, but that appellee Rasberry had no objection to the check evidencing his attorneys' fees being payable to appellant as joint payee [Ex. 11 of appellee Baldwin's affidavit; Tr. pp. 108-109]. Appellee Rasberry's original letter of May 31, 1947, to which was attached the so-called confidential letter and the letter agreement dated August 6, 1943, was sent to James R. Garfield *via regular mail* [Ex. 14 of appellee Baldwin's affidavit; Tr. p. 113]. A copy of said letter *without attachments* was sent to James R. Garfield *via air mail* [Ex. 14 of appellee Baldwin's affidavit; Tr. p. 113].

By letter dated June 3, 1947, James R. Garfield answered the air-mailed *copy* of appellee Rasberry's letter dated May 31, 1947, and advised that the distribution of the funds was to be made in accordance with the agreement of Octo-

ber 29, 1943 [Ex. 13 of appellee Baldwin's affidavit; Tr. p. 112]. *At that time the trustee (James R. Garfield) did not have before him the letter agreement dated August 6, 1943 as it had been forwarded with the original letter of May 31, 1947 by regular mail* [Ex. 14 of appellee Baldwin's affidavit; Tr. p. 113].

Approximately one month elapsed between the time appellee Raspberry made his request for direct payment by the letter dated May 31, 1947, and the time appellee Baldwin forwarded two checks to appellee Raspberry which represented appellant's share in the third installment of said award, one check payable to appellant and one check payable to appellee Raspberry [Ex. 15 of appellee Baldwin's affidavit; Tr. pp. 114-115]. *During said month appellant, though apprised of appellee Raspberry's request for direct payment, made no objection, either directly or indirectly, to appellee Baldwin.* Thereafter appellee Raspberry, by letters, continued to advise appellee Baldwin that he was entitled to 15% of the proceeds due appellant as attorneys' fees by virtue of the letter agreement dated August 6, 1943, and continued to request that in making disbursements appellee Baldwin issue two checks as hereinbefore noted. *Copies of all such letters were forwarded to appellant's president and secretary-treasurer* [Exs. 18 and 22 of appellee Baldwin's affidavit; Tr. pp. 118-119, 124-125]. *No objection to these requests by appellant, either directly or indirectly, was ever received by appellee Baldwin* [Ex. 31 of appellee Baldwin's affidavit; Tr. pp. 146-148]. To the contrary, the record clearly shows that appellant actively participated in this manner of distribution for several years [Ex. 16 of appellee Baldwin's affidavit; Tr. p. 116; Ex. 20 of appellee Baldwin's affidavit; Tr. p. 122; Ex. 24 of appellee Bald-

win's affidavit; Tr. p. 130; Ex. 33 of appellee Baldwin's affidavit; Tr. pp. 152-154]. It was not until January of 1950, that appellant, by letter dated January 19, 1950, directed appellee Baldwin to make all payments due it under the terms of the October 29, 1943, trust agreement direct to appellant [Ex. 29 of appellee Baldwin's affidavit; Tr. pp. 140-143]. Thereafter by letter dated February 6, 1950, appellee Rasberry advised appellee Baldwin:

“Under no circumstances deliver our 15% part of the proceeds realized by Palomas Land and Cattle Company from the above claim to the Palomas Land and Cattle Company but, on the contrary, *we must insist that our part of these proceeds be paid over and delivered to us by the trustees*” [Ex. 34 of appellee Baldwin's affidavit; Tr. pp. 155-156].

Here for the first time appellee Baldwin knew of the conflict between appellant and appellee Rasberry [Ex. 36 of appellee Baldwin's affidavit; Tr. pp. 162-164].

The brief sequence of events hereinbefore set forth establishes conclusively that appellee Baldwin was at all times acting in good faith; that it was the acts and omissions of appellant which placed appellee Baldwin in a position where it was necessary for him to seek relief under the Federal Interpleader Act.

C. *The confidential letter.* The emphasis that appellant has placed upon the so-called confidential letter of May 31, 1947, is wholly unwarranted (App. Br. pp. 38-42). Such letter has been set out in full in appellant's brief (pp. 39-40). A careful reading of the letter fails to disclose any information contained therein of which the appellant was not already fully aware. The appellant had executed the letter agreement dated August 6, 1943

[Ex. 12 of appellee Baldwin's affidavit; Tr. pp. 110-111] upon which appellee Raspberry bases his contention of an assignment. Appellant had already admitted that such letter agreement did constitute an assignment [Tr. pp. 35-37; Exs. D and E of appellee Raspberry's affidavit; Tr. pp. 54-55]. A copy of the letter dated May 31, 1947, which was forwarded to appellant's president and secretary-treasurer, advised appellant that appellee Raspberry was requesting direct payment [Ex. 10 of appellee Baldwin's affidavit; Tr. pp. 107-109]. Appellee Baldwin was under no duty, as a trustee or otherwise, to relay information to appellant *that was already within appellant's knowledge*.

1 *Restatement of the Law of Trusts*, Sec. 173, Comment D, p. 448.

5. The Label of Trustee Placed Upon Appellee Baldwin and Others Since Deceased, by the October 29, 1943 Agreement, Does Not Deprive Appellee Baldwin of the Right to Relief Under the Federal Interpleader Act.

A. THE AGREEMENT DATED OCTOBER 29, 1943 MERELY PLACED APPELLEE BALDWIN AND OTHERS IN THE POSITION OF SIMPLE STAKEHOLDERS.

The agreement of October 29, 1943, was a business agreement to settle disputed claims to an award by the General Claims Commission.

It is true that the agreement dated October 29, 1943 [Ex. 1 of appellee Baldwin's affidavit; Tr. pp. 84-91] was prepared in the form of a trust naming appellee Baldwin, James R. Garfield, since deceased, and Clare M. Vrooman, since deceased, as trustees. A careful reading of said agreement discloses that it is not a declaration of trust wherein a trustor conveys a *res* to a trustee to be in-

vested, reinvested, managed and dealt with for uses and purposes therein declared.

The agreement constitutes a settlement between claimants asserting claims to moneys paid and to be paid under an award published by the General Claims Commission [Tr. pp. 71-74]. The named trustees were assignees of the interest of appellant and Security-First National Bank of Los Angeles [Ex. 1 of appellee Baldwin's affidavit; Tr. p. 86] and *were empowered by said agreement merely to collect and disburse sums paid on said award to appellant and said Bank, retaining a share for themselves.*

This arrangement for collection and disbursement was designed for the purpose of carrying into effect a settlement in compromise of litigation wherein appellee Baldwin and the other named trustees in reality were simple stakeholders. That simple stakeholders are entitled to relief under the Federal Interpleader Act is not open to question.

B. APPELLEE BALDWIN, AS A TRUSTEE PLACED IN A POSITION OF DOUBLE VEXATION BY APPELLANT, IS ENTITLED TO RELIEF UNDER THE FEDERAL INTERPLEADER ACT.

As hereinbefore pointed out, the right to maintain an action of interpleader under the Federal Interpleader Act is absolute where, as here, the essential and jurisdictional facts have been established.

But appellant urges that appellee Baldwin is not entitled to interplead under the Act because he was acting as a trustee in disbursing the Mexican Claims award (App. Br. pp. 23-26). This is not the law. The Federal Interpleader Act does not deny its benefits to trustees. Such Act distinctly gives the District Courts "original jurisdic-

tion of any civil action of interpleader or in the nature of interpleader, filed by *any person*," etc. (Sec. 1335, Title 28, U. S. C. A.).

Zechariah Chafee, Jr., draftsman of the Federal Interpleader Act of 1936, very aptly expressed the purpose of said Act when he stated:

"The main purpose of the Federal Interpleader Act of January 20, 1936, was to give the United States courts power to protect *any stakeholder* who was threatened with conflicting claims asserted by citizens of different states."

49 *Yale Law Journal* 377.

Appellant in support of its contention that a trustee under the Federal Interpleader Act may not interplead a beneficiary and a hostile claimant refers to certain texts and states:

"Neither in Prof. Scott's definitive treatise on 'The Law of Trusts' (and 1950 Supplement) . . . nor in Perry, 'Trusts and Trustees' (7th Ed., 1929), is there claimed for the trustee the right to interplead his beneficiary with a hostile claimant' and 'the absence of the assertion of such a right . . . is strong evidence of the fact that the asserted claim does not exist' (App. Br. p. 28).

Conclusive answers to this statement are:

1. Messrs. Scott and Perry were not writing a text on the Federal Interpleader Act;
2. Federal Courts have uniformly permitted trustees to obtain relief under such Act.

In *Security Trust Co. etc. v. Woodward, et al.* (D. C. S. D. N. Y., 1947), 73 Fed. Supp. 667, dealing with a

motion by one of the defendants to dismiss the action of interpleader filed by a trustee, the Court states (p. 669):

“The essentials required by section 41(26) are: (1) that the stakeholder shall be subjected to conflicting claims, by (2) two or more claimants, citizens of different states; (3) to one or more of whom he is under obligation for \$500 or more, and (4) he shall have deposited the amount claimed in the registry of the court to abide final judgment. Those facts being established the stakeholder may maintain interpleader in a District Court of a district . . .”

Thereafter the Court granted the trustee the requested relief as provided by the Federal Interpleader Act.

To the same effect are:

Blackman v. Mackay (D. C. S. D. N. Y., 1946),
65 Fed. Supp. 48;

United Building & Loan Ass'n v. Garrett (D. C.,
Ark., 1946), 64 Fed. Supp. 460;

Warner v. Florida Bank & Trust Co. (C. C. A. 5,
1947), 160 F. 2d 766.

Appellant's statement to the effect that the case of *Security Trust Co. etc. v. Woodward, et al., supra*, involves a consenting beneficiary and is therefore distinguishable from the instant case (App. Br. pp. 23-24) is, in the opinion of appellee Baldwin, without merit. A careful review of said case fails to disclose any statements to the effect that:

1. The beneficiary consented to the action of interpleader brought by his trustee, or

2. A trustee must obtain consent from a beneficiary before such trustee can maintain an action of

interpleader as between a beneficiary and a so-called stranger to the trust.

Many state courts have also granted relief to trustees by way of interpleader. See, for example:

Novinger Bank v. St. Louis Union Trust Co. (Mo., 1916), 189 S. W. 826, 196 Mo. App. 335;

Leber v. Ross (N. J., 1921), 113 Atl. 606, 92 N. J. E. Rep. 535;

Van Orden v. Anderson (1932), 122 Cal. App. 132, 92 Pac. 572.

And where, as here, it is an affirmative act of a beneficiary, *i. e.*, the admitted assignment of a portion of the proceeds due such beneficiary, which has placed the trustee in a position of double vexation and possible double liability, there should be no doubt that the trustee is entitled to full relief under the Federal Interpleader Act.

II.

The District Court Did Not Err in Awarding Appellee Baldwin Attorneys' Fees and Costs.

1. The Language of the Trust Agreement Does Not Prohibit an Award of Attorneys' Fees and Costs.

That portion of the agreement dated October 29, 1943, upon which appellant bases its contention that appellee Baldwin is not entitled to attorneys' fees and costs reads as follows:

"The Trustees shall execute this trust without charge. No expense shall be incurred without first obtaining the written approval of Palomas and Bank" [Ex. 1 of appellee Baldwin's affidavit; Tr. p. 86].

This provision means no more than that the designated trustees shall do the acts required of them under the terms of said agreement *without being compensated therefor* and that, if it is necessary for the trustees to incur expenses *in the execution of the trust*, then such expenses shall not be incurred by the trustees without first obtaining the written approval as provided in said agreement. The whole tenor of the provision is to allow "Palomas and Bank" control over expenditures which may arise *in the execution of the trust*.

But the attorneys' fees and costs awarded appellee Baldwin by the judgment of the District Court did not arise *in the execution of the trust*, i. e., in receiving, caring for and disbursing the moneys received under the award. They were expenses imposed upon the so-called trustees solely because of the acts and omissions of a beneficiary of the so-called trust, which threatened to draw the so-called trustees into litigation and by possibly imposing on them double liability. Certainly the statement in the agreement that the trustees "*shall execute the trust without charge*" did not mean (and could not have been understood by the parties to mean) that the trustees, faced with lawsuits and possible liability quite apart from any execution of the trust, should be required to shoulder the expense of extricating themselves from such difficulties which were not of their own making.

It is readily apparent that expenses arising out of an action of interpleader filed by the trustee were not contemplated by the parties and they did not contract with respect thereto. The trustees by this provision did not agree to assume the obligation to settle any disputes that may

arise between appellant and an assignee of appellant. The only reasonable conclusion that can be reached is that costs and attorneys' fees arising out of the filing of an interpleader action by the trustee are not the type of expenses for which written approval had to be first obtained before it could be incurred by the trustees.

2. **The Applicable Law in Regard to Appellee Baldwin's Right to Recover Costs and Attorneys' Fees Is Federal Law. The Case of *Erie R. Co. v. Tompkins*, 304 U. S. 64, Is Not Applicable Where One Is Seeking Equitable Relief Under a Federal Statute Which Creates a Federal Equitable Right.**

As hereinbefore pointed out, appellee Baldwin did not bring this action in the trial court pursuant to any state-created right. Rather it was brought under a federal right permitting one to maintain an interpleader action in many instances where the action would not be permitted under state law. Stated in another way, where one is seeking to interplead adverse claimants under the Federal Interpleader Act, he is asking the Federal Courts to enforce equitable rights created by federal statutes, including the equitable right to recover costs and attorneys' fees. Such rights should be enforced by the Federal Courts according to federal equity jurisprudence.

Holmberg v. Armbrecht (C. C. A. 2, 1946), 327 U. S. 392, 395, 397, 90 L. Ed. 743;

Angel v. Bullington (C. C. A. 4, 1947), 330 U. S. 183.

3. **Historically, Federal Equity Jurisprudence Has Permitted an Award of Costs and Attorneys' Fees to the Plaintiff in an Action of Interpleader.**

It is admitted that there is nothing in the Federal Interpleader Act which confers costs and attorneys' fees to the interpleader. However, such an omission does not bar appellee Baldwin's right to recover such items when such rights are being enforced pursuant to a federal statute. As was aptly expressed in *Holmberg v. Armbrecht*, *supra*, at page 395:

"When Congress leaves to the federal courts *the formulation of remedial details*, it can hardly expect them to break with historic principles of equity in the enforcement of federally-created equitable rights."

And see:

Sprague v. Ticonic Bank, 307 U. S. 161, 164-167, 83 L. Ed. 1184;

Trustees v. Greenough, 105 U. S. 527, 27 L. Ed. 1157.

The case of *Guaranty Trust Co. v. York*, 326 U. S. 99, referred to in appellant's brief (App. Br. p. 44) and relied upon in the case of *Danville Building Ass'n v. Gates* (D. C. E. D. Ill., 1946), 66 Fed. Supp. 706, only involved the question of which law the Federal Courts should apply when Federal Courts *are called upon to interpret state-created rights*, and the *sole basis* of the Federal Court's jurisdiction is diversity of citizenship. As the Court in *Guaranty Trust Co. v. York*, *supra*, stated on page 101:

"Our problem only touches transactions for which rights and obligations *are created by one of the States*,

and for the assertion of which, in case of diversity of citizenship of the parties, Congress has made a federal court another available forum.”

And again on page 108:

“Here we are dealing with the right to *recover derived not from the United States but from one of the States*. . . .”

Since the cases of *Guaranty Trust Co. v. York*, *supra*, and *Danville Building Ass'n v. Gates*, *supra*, the United States Supreme Court has rendered a decision which governs the principle involved here, *Holmberg v. Armbrecht*, *supra*.

This Court, as well as other Federal Courts, has recognized the right of plaintiff to be awarded costs and attorneys' fees in a federal interpleader action.

Kohler v. Kohler (C. C. A. 9, 1939), 104 F. 2d 38, 41;

Massachusetts Mut. Life Ins. Co. v. Morris (C. C. A. 9, 1932), 61 F. 2d 104, 105;

Allen v. Hudson (C. C. A. 8, 1929), 35 F. 2d 330;

Globe Indemnity Co. v. Puget Sound Co. (C. C. A. 2, 1946), 154 F. 2d 249, 250;

Caten v. Eagle Bldg. & Loan Ass'n (D. C. W. D. Pa., 1909), 177 Fed. 996, 997.

As the right of a plaintiff in a federal interpleader action to recover attorneys' fees and costs has been established under the principles of federal equity jurisprudence, appellee Baldwin should be entitled to recover such items in this action regardless of any state law to the contrary.

4. If Federal Equitable Principles Are Not Applicable in a Determination of Appellee Baldwin's Right to Recover Costs and Attorneys' Fees in an Action Brought Under the Federal Interpleader Act, Nevertheless the State Law of California Has Permitted Recovery of Attorneys' Fees and Costs by a Trustee Who Has Filed an Action of Interpleader.

It has been held by the Courts of California that a trustee, in maintaining an action of interpleader, is entitled to recover costs and attorneys' fees from the fund deposited in the registry of the trial court.

Van Orden v. Anderson, supra.

5. Even if California Law Does Not Permit the Recovery of Attorneys' Fees in an Interpleader Action, the Failure of the Trial Court to Apply California Law May Not Be Assigned as Error for the First Time on Appeal.

At no stage of the proceedings prior to this appeal was the attention of the trial court called to the California law respecting the right of a plaintiff in an interpleader action to recover attorneys' fees. The first time that appellant raised the issue of whether California law permitted attorneys' fees in interpleader actions was on this appeal. The sole issue in this respect in all proceedings prior to this appeal was whether *the agreement dated October 29, 1943, controlled appellee Baldwin's right to recover such attorneys' fees* [Tr. pp. 210, 227].

Failure of the trial court to apply the California law in this respect, if it was required so to do, may not be assigned as error for the first time on appeal.

Great American Ins. Co. v. Glenwood Irr. Co. (C. C. A. 8, 1920), 265 Fed. 594, 596-597;

Prudential Ins. Co. of America v. Carlson (C. C. A. 10, 1942), 126 F. 2d 607, 611-612.

As was stated on page 611 in *Prudential Ins. Co. of America v. Carlson*, *supra*:

“It is urged that in any event the judgment of the court awarding attorneys’ fees is erroneous and must be set aside. . . . It seems to be admitted that attorneys’ fees are not recoverable under the laws of New Jersey. The court therefore erred in entering judgment for the recovery of such fees.

“It does not follow, however, that such error requires a reversal of the case. *At no stage of the proceedings was the attention of the trial court called to the New Jersey law.* . . . And while federal courts take judicial notice of the laws not only of the forum but also those of other states, *Mather v. Stokely*, 1 Cir., 218 F. 764; *Brown v. Ford Motor Co.*, 10 Cir., 48 F. 2d 732; *Parker v. Parker*, 10 Cir., 82 F. 2d 575; *Kaye v. May*, 3 Cir., 296 F. 450, *that means no more than that one relying upon a statute of a foreign state need not plead it. It does not follow, however, that a court actually knows or considers the law of the foreign state, and one relying upon such a law is not relieved from calling it to the attention of the court at a proper time. If this is not done, failure of the court to apply the foreign law may not be assigned as error for the first time on appeal.*”

III.

Appellant Has Violated Rule 75(e) of Federal Rules of Civil Procedure, Title 28, U. S. C. A., and, Whatever the Decision on This Appeal, Should Be Required to Bear the Costs Incurred by such Violation.

Appellee Baldwin respectfully brings to this Court's attention appellant's complete disregard of Rule 75(e) of the Federal Rules of Civil Procedure.

In disregarding the explicit language of said Rule 75(e) appellant has

1. Included formal parts of all exhibits;
2. Included irrelevant and formal portions of all documents;
3. Included more than one copy of the following designated documents:

A. The October 29, 1943, agreement [affidavit of Letha Metcalf, Tr. pp. 20-26; Ex. B of appellee Raspberry's affidavit, Tr. pp. 46-52; Ex. 1 of appellee Baldwin's affidavit, Tr. pp. 84-91];

B. The August 6, 1943, letter agreement [affidavit of Roland Rich Woolley, Tr. pp. 16-17; Ex. A of appellee Raspberry's affidavit, Tr. pp. 44-46; Ex. 12 of appellee Baldwin's affidavit, Tr. pp. 110-111];

C. A letter dated July 1, 1947, written by appellee Baldwin [Ex. H of appellee Raspberry's affidavit, Tr. pp. 59-61; Ex. 15 of appellee Baldwin's affidavit, Tr. pp. 114-115];

D. A letter dated January 24, 1948, written by appellee Raspberry [Ex. J of appellee Raspberry's affi-

davit, Tr. pp. 62-63; Ex. 18 of appellee Baldwin's affidavit, Tr. pp. 118-119];

E. A letter dated March 4, 1948, written by James R. Garfield [Ex. K of appellee Rasberry's affidavit, Tr. p. 64; Ex. 19 of appellee Baldwin's affidavit, Tr. pp. 120, 121];

F. Letter dated December 27, 1948, written by appellee Rasberry [Ex. L of appellee Rasberry's affidavit, Tr. pp. 65-66; Ex. 22 of appellee Baldwin's affidavit, Tr. pp. 124-125];

G. Letter dated February 4, 1949, written by James R. Garfield [Ex. M of appellee Rasberry's affidavit, Tr. pp. 66-67; Ex. 23 of appellee Baldwin's affidavit, Tr. pp. 127-129];

4. Included a large amount of material not essential to the decision of the question presented by this appeal. Appellant states, "Except where otherwise specifically indicated, *the facts pertinent to the determination of this appeal are taken from plaintiff's own affidavit* and the exhibits attached thereto" (App. Br. p. 3, Note 1). A careful examination of appellant's brief reveals that nowhere therein did appellant deem it necessary to refer to

A. The affidavit of Letha Metcalf [Tr. pp. 18-20];

B. The additional affidavit of Letha Metcalf [Tr. pp. 166-170];

C. The affidavit of appellee Rasberry [Tr. pp. 29-68] except for the following:

1. Exhibit C of appellee Rasberry's affidavit (App. Br. p. 5);

2. That portion of appellee Raspberry's affidavit noted on Tr. p. 38 (App. Br. p. 6);
3. That portion of appellee Raspberry's affidavit noted on Tr. pp. 34 and 43 (App. Br. p. 31);

D. A large portion of the lengthy affidavit of Arthur D. Baldwin [Tr. pp. 68-166]. In particular appellant has included the following exhibits which have not been used or referred to by appellant in its brief:

1. Exhibit 2 [Tr. pp. 91-93];
2. Exhibit 3 [Tr. pp. 93-96];
3. Exhibit 4 [Tr. pp. 96-98];
4. Exhibit 17 [Tr. p. 117];
5. Exhibit 21 [Tr. pp. 123-124];
6. Exhibit 25 [Tr. pp. 131-132];
7. Exhibit 32 [Tr. pp. 149-151].

Because of the failure of appellant to make any effort to follow said Rule 75(e) the record as requested by said appellant is repetitious and unusually long. Appellee Baldwin therefore respectfully requests that, whatever the decision on this appeal, appellant should be required to bear the costs incurred by such violation.

Phillips Petroleum Co. v. Williams (C. C. A. 5, 1947), 159 F. 2d 1011;

Layne-Minnesota Co. v. City of Beresford, S. D. (C. C. A. 8, 1949), 175 F. 2d 161, 169;

Pet Milk Co. v. Boland (C. C. A. 8, 1949), 175 F. 2d 151;

Chalmette Petroleum Corp. v. Chalmette's Oil Dist., Co. (C. C. A. 5, 1944), 143 F. 2d 826, 829;

Knutson v. Metallic Slab Form Co. (C. C. A. 5, 1942), 132 F. 2d 231.

IV.

Conclusion.

Clearly the facts of this case entitle appellee Baldwin to full relief under the Federal Interpleader Act and, as a part thereof, entitle him to recover attorneys' fees and costs from the fund heretofore deposited in the registry of the trial court.

It is respectfully submitted that the permanent injunction and order directing interpleader, discharging plaintiff and allowing attorneys' fees, expenses and costs should be affirmed.

Respectfully submitted,

WM. T. COFFIN,

L. B. CONANT,

Attorneys for Appellee Baldwin.

LAWLER, FELIX & HALL,

Of Counsel.

No. 12692

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PALOMAS LAND AND CATTLE COMPANY, a Corporation,
Appellant,

vs.

ARTHUR D. BALDWIN, as Surviving Trustee Under a
Certain Agreement of Trust Dated October 29, 1943;
LOUIS A. SCOTT, JOHN L. RASBERRY, and JAMES F.
HULSE, Partners Doing Business Under the Firm
Name and Style of BURGESS, SCOTT, RASBERRY &
HULSE,

Appellees.

On Appeal From the United States District Court for the
Southern District of California Central Division

Brief of Appellees Louis A. Scott, John L. Rasberry
and James F. Hulse.

OVERTON, LYMAN, PRINCE & VERMILLE and
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L. Rasberry and James F. Hulse.*

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Name and Style of BURGESS, SCOTT, RASBERRY &
HULSE,

Appellees.

Brief of Appellees Louis A. Scott, John L. Rasberry
and James F. Hulse.

Appellees LOUIS A. SCOTT, JOHN L. RASBERRY and
JAMES F. HULSE (hereinafter for convenience referred to
usually as "appellee Rasberry" and sometimes as the "law
firm") join in and adopt the brief filed herein by appellee
ARTHUR D. BALDWIN (hereinafter usually referred to as
"appellee Baldwin"). In addition, appellee Rasberry re-
spectfully submits the following supplementary comments:

I.

The Court Below Properly Entertained Jurisdiction of
This Interpleader Action.

The main question brought to this Court by appellant is one of *jurisdiction*; that is, whether the District Court had power to entertain the within interpleader action.

Title 28 U. S. C. 1335 is clear and explicit. It confers interpleader jurisdiction “* * * if (1) Two or more adverse claimants * * * *are claiming or may claim*¹ to be entitled * * *” to the sum of \$500.00 or more in the plaintiff’s possession “* * * and if (2) the plaintiff has deposited such money * * * into the registry of the court * * *.” These facts were pleaded in the Complaint, and plaintiff by moving to dismiss has, of course, admitted them to be true for purposes of this appeal.

As held in the cases cited by appellee Baldwin in his brief herein, there is no restriction on the scope of that clear language anywhere in the Judicial Code or in the Federal Rules of Civil Procedure. It is submitted that when appellant urges that District Courts have no *power* to entertain an interpleader action brought by a trustee,² who alleges the jurisdictional facts, and when appellant further seeks to impose, as a condition to *jurisdiction*, that there be a showing of *bona fides*, appellant is simply asking that this Court by judicial action, in effect, amend the clear and unqualified terms of a simple statute.

¹Italics, unless otherwise indicated, are supplied.

²Actually plaintiff is no more than a stakeholder or escrow-holder—not a trustee—as the so-called “trust” Agreement shows [Tr. p. 84].

II.

The Findings That the Claim of Defendant Law Firm Is Tenable and Is Asserted in Good Faith, Are Supported and Were Not Made in Error.

Appellant's Brief commencing at page 19, asserts that the Court below erred in finding that the claim of the defendant law firm was tenable [Tr. p. 190] and was asserted in good faith [Tr. p. 192].

A. The Claim of Defendant Law Firm Was Tenable.

The agreement between appellant and the law firm was that the latter “* * * shall receive 15% of all sums realized * * *” by appellant in the event the matters in controversy were “* * * settled by agreement after the filing of any suit * * *” [Tr. p. 45]. Appellant affirmatively asserted under oath to the United States Treasury Department that the above agreement constituted an *assignment* of a 15% contingent interest to the law firm [Tr. pp. 35-38; 54, 55].

An agreement that an attorney shall “receive” or “have” a percentage of a recovery, operates to vest title in the attorney to the extent of that percentage of the recovery when it is received; and after notice of the right of the attorneys, all parties dealing with the assignor do so at their peril.

Barnes v. Alexander, 232 U. S. 117, 68 L. Ed. 530;
Wylie v. Cox, 15 How. (U. S. 415, 14 L. Ed. 753;

Woodbury v. Andrew Jergins Co., 69 F. 2d 49,
(C. C. A. 2, 1934);

Wilson v. Seeber, 72 N. J. Eq. 523, 66 Atl. 909;

Geddes v. Reeves, 20 F. 2d 48 (C. C. A. 8, 1927),
cert. den. 275 U. S. 556, 72 L. Ed. 424;

Lewis v. Braun, 356 Ill. 467, 191 N. E. 56;

Fairbanks v. Sargent, 104 N. Y. 108, 9 N. E.
870, and further opinion in 117 N. Y. 320, 22
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Hawk v. Ament, 28 Ill. App. 390;

Northern Texas Traction Co. v. Clark & Sweeton,
272 S. W. 564 (Tex. Civ. App. 1925);

Ives v. Culton, 229 S. W. 321 (Tex. 1921);

C. W. Hahl & Co. v. Hutcheson, 196 S. W. 262,
(Tex. Civ. App. 1917);

Wagner v. Sariotti, 56 Cal. App. 2d 693.

In the *Barnes case*, *supra*, the United States Supreme Court had before it an agreement between two attorneys as follows: “* * * I will give you one-third of the fee which I have coming to me * * *.” There was no formal instrument of transfer or assignment. The Supreme Court held that even though words of contract rather than of conveyance were used the parties nevertheless had in mind only the fund to be recovered and that it was intended that one-third of that fund itself if, when, and as received would go to the promisee. The Court held a lien in the attorney’s favor came into existence by operation of that agreement.

In the *C. W. Hahl & Co.* case, the agreement before the Court of Civil Appeals of Texas provided that the clients agreed “* * * to pay to” the attorney “* * * one half of any amount that may be recovered * * *.” There also the contract contained no words of transfer or

conveyance or assignment. Citing numerous authorities the court held as follows, at 196 S. W. 266:

“We think the contract above mentioned, construed in the light of the circumstances under which it was made, clearly evidences that the intention of the parties in its execution was to give appellees one-half of the judgment rendered in the suit, *and notwithstanding the fact that it contains no words of conveyance of an interest in the cause of action*, when the judgment was obtained appellees became the equitable owners of one-half thereof. *‘An equitable or constructive assignment does not depend upon any particular form of words, but the court of equity constructs the assignment out of the situation of the parties. Any language or act which makes an appropriation of a fund amounts to an equitable assignment of that fund. No particular form of words or form of instrument is necessary.’ ”*

In the *Northern Texas Traction Co.* case, the same Texas Court had before it a contract by which the attorneys were “to have a one-third” portion of whatever amount of money should be “*realized or received*” if the matter was disposed of by compromise and “to have a 40%” portion of the amount of any judgment for damages rendered on the trial. Before the case came to trial the clients effected a settlement with the defendant and refused to pay the attorney’s fees. In an action brought by the attorneys against their client and the defendant, the Court held as follows, at page 567:

“As between the attorneys and their client, one-third of the particular sum of money belonged, with-

out doubt, in good conscience and equity, to the attorneys. It is within the fixed rule that an agreement between client and attorney, by which the attorney is to have for his services a fixed portion of whatever amount of money shall be realized or received, whether on settlement or without settlement, on account of such claim as shall be put in suit, whether of tort or contract, constitutes an equitable assignment *pro tanto*. The doctrine is fully laid down in Story Eq. Jur. section 1040, and in 3 Pomeroy Eq. Jur. section 1280. The rule is followed in this state. (Citations.) Being as it is, an 'equitable assignment *pro tanto*' of the particular sum of money, the interest therein is not merely a lien or charge, *but in the nature of property vesting absolutely in the assignee attorneys.*

“* * *

“As assignees having dominion over the assigned portion, the attorneys required no authority or consent to authorize them to collect and receive their fixed portion of the particular debt, and the debtor traction company had no authority or right to refuse payment or to settle and pay that fixed portion to any one but the assignee attorneys. And, after notice of the assignment was given to the debtor, in this case the traction company, *such assignment became so far complete as to vest title absolutely in the attorneys as assignees*, as against attaching creditors of the assignors, and collusive agreements of the assignors and the debtor.”

The Court described the position of the debtor after receiving notice of the assignment as follows, at page 568:

“*After notice the debtor deals with the assignor at his peril.* 4 Cyc. p. 90. It is only in case the debtor

makes payment of the full sum of money to the assignor before notice of the assignment that the payment will be valid against the assignee.”

Under the above authorities it is respectfully submitted that appellee Rasberry and his law firm did in fact have an absolute right to 15% of each and every installment. The claim therefore was tenable and the finding to that effect was supported.

B. The Claim of the Law Firm Was Asserted in Good Faith.

The exhibits to the Rasberry affidavit [Tr. pp. 44 to 68, incl.] and those to the Baldwin affidavit [Tr. pp. 84 to 165, incl.], together with the other facts as outlined in appellee Baldwin's brief, clearly demonstrate that appellee Rasberry, as well as appellee Baldwin, acted in entire good faith in the whole matter. They show not only an agreement by appellant in favor of appellee Rasberry that the latter “shall receive 15% of all sums realized” [Tr. p. 44] but reflect numerous and repeated claims by appellee Rasberry that the latter was “entitled to 15% of the proceeds” [Tr. pp. 56, 63 and 65], *copies of each of which were sent to the officers of appellant* [Tr. pp. 39, 57, 41, 63, 42, 66]. The evidence affirmatively shows that appellant itself unequivocally recognized under oath in Federal tax returns that there had been “*assigned*” to appellee Rasberry the 15% “contingent interest” in all recoveries [Tr. pp. 54 and 55]. Further the whole matter was fully explained to Mrs. Letha L. Stephenson by appellee Rasberry by his letter of May 31, 1947, with which was en-

closed appellee Rasberry's letter of the same date to Mr. Garfield [Tr. pp. 39, 56 and 59]. Furthermore the *separate* checks for the 15% payable to appellee Rasberry of the third, fourth and fifth installments were endorsed not only by appellee Rasberry *but also by the officers of appellant* [Tr. pp. 40, 41, 42, 116, 122 and 130].

The "confidential letter" of May 31, 1947 [Tr. p. 108]—of which appellant attempts to make so much capital—was simply a harmless and non-prejudicial statement advising appellee Baldwin's predecessor specifically as to the attorneys' fee agreement of August 6, 1943, between appellant and appellee Rasberry, together with a further statement that the separate check for the attorneys' fee could be payable to both appellant and appellee Rasberry as joint payees.

This "confidential letter" was enclosed in the same envelope as the other letter of May 31, 1947 [Tr. p. 76], a copy of which went to Letha L. Stephenson [Tr. pp. 76, 39], in which appellee Rasberry not only stated his claim to 15% of the proceeds [Tr. p. 107] but also requested that the 15% be the subject of a separate check payable only "to this firm." The "confidential letter" therefore, by stating there was no objection that the 15% check be made payable to both the law firm and appellant, actually *modified* the request in favor of appellant. How can this be bad faith on anyone's part?

That the law firm had a perfect right to address that "confidential letter" solely to appellee Baldwin's predecessor, without advising appellant, is clear from the fol-

lowing language, also above quoted from the *Northern Texas Traction Co.* case, 272 S. W. 564, 567:

“As assignees having dominion over the assigned portion, the attorneys required no authority or consent to authorize them to collect and receive their fixed portion of the particular debt, and the debtor traction company had no authority or right to refuse payment or to settle and pay that fixed portion to any one but the assignee attorneys.”

Appellant contends (App. Br. p. 34) there was bad faith since appellee Rasberry in his letter of June 4, 1947 [Tr. p. 113], to Mr. Garfield, did not *insist* on direct payment of the 15% to himself alone, but rather was content to have that check made payable jointly to the firm and appellant. Had the reverse happened—had appellee Rasberry insisted on being sole payee and had appellee Baldwin so made and paid the 15% check without either appellee advising appellant—there might be some substance to the point. But on this record, appellant is simply arguing there was bad faith because nothing was done behind its back!

It is respectfully submitted that appellee Rasberry and his law firm, as well as appellee Baldwin and his predecessors, acted in complete and entire good faith on the whole matter. Nothing was kept from appellant, in fact, the record discloses that the appellant was kept fully advised of everything. The findings of good faith, it is submitted, are well supported.

Conclusion.

A controversy between a client and his attorney is always regrettable. The most that has happened here, however, is that a controversy has arisen. There has been no bad faith either on the part of appellee Baldwin or on the part of appellee Raspberry and the law firm.

Appellee Baldwin is simply in a position where he has been confronted with conflicting claims. His situation is precisely the one for which the Federal Interpleader Act was enacted. The court below had jurisdiction and acted properly in making the order under appeal.

Respectfully submitted,

OVERTON, LYMAN, PRINCE & VERMILLE and
CARL J. SCHUCK,

By CARL J. SCHUCK,

*Attorneys for Appellees Louis A. Scott, John
L. Raspberry and James F. Hulse.*

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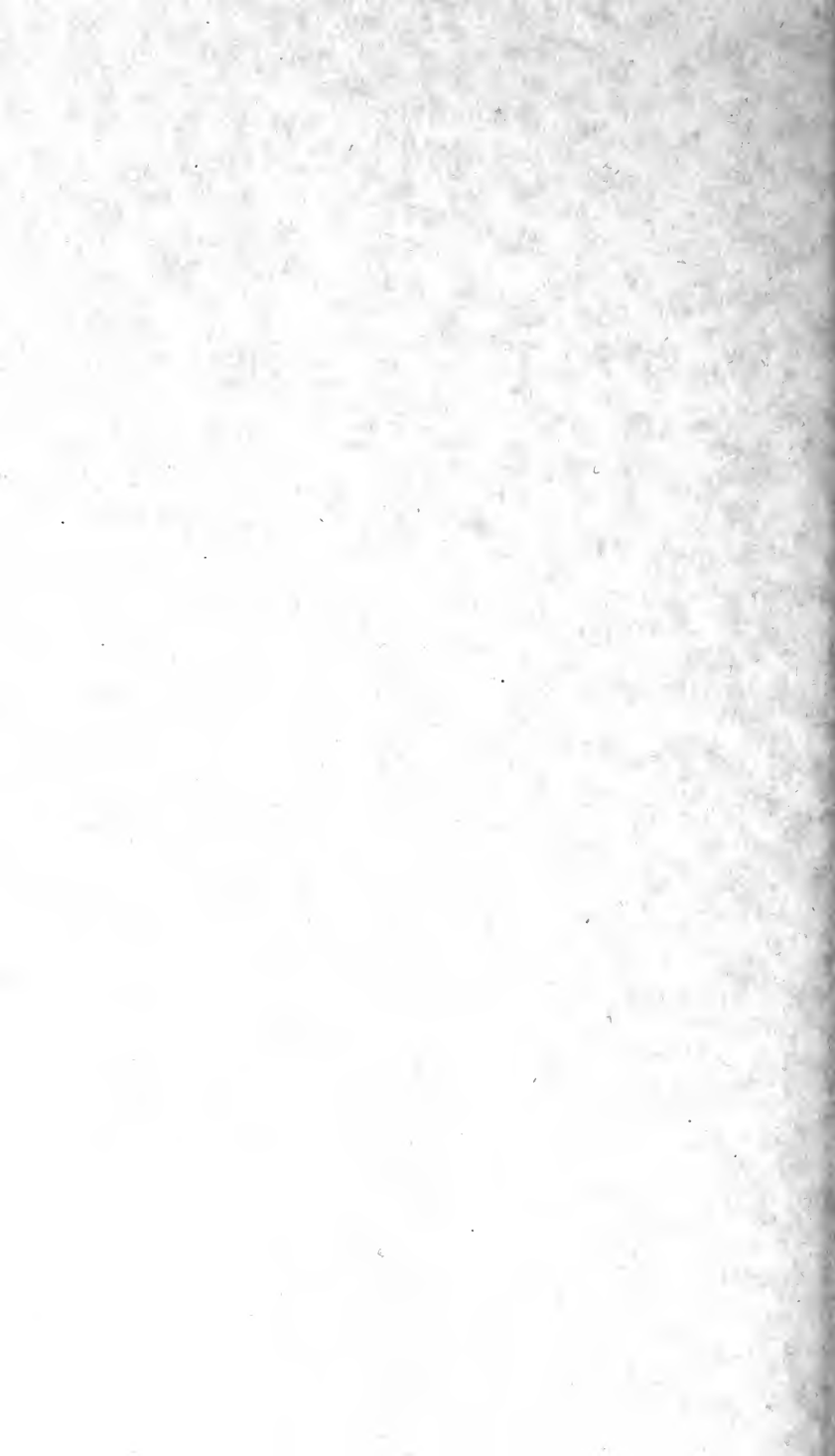
APPELLANT'S REPLY BRIEF.

On Appeal From the United States District Court for the
Southern District of California Central Division

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No. 12692
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

PALOMAS LAND AND CATTLE COMPANY, a Corporation,
Appellant,

vs.

ARTHUR D. BALDWIN, as Surviving Trustee Under a Certain Agreement of Trust Dated October 29, 1943;
LOUIS A. SCOTT, JOHN L. RASBERRY and JAMES F. HULSE, Partners Doing Business Under the Firm Name and Style of Burges, Scott, Rasberry & Hulse,
Appellees.

APPELLANT'S REPLY BRIEF.

Introduction.

A reading of the Brief of Appellee Arthur D. Baldwin (herein for convenience called "the Baldwin Brief") and the Brief of Appellees Louis A. Scott, John L. Rasberry and James F. Hulse (herein for convenience called "the Rasberry Brief") makes it apparent that the principal issue of the appeal—to wit, the personal disability of the trustee of an express trust to force his beneficiary to interplead with a hostile claimant to the trust funds—has not been met head-on. This omission, as well as what is believed to be misconstruction of the record and miscitation of authorities, requires reply.

I.

Trustee May Not Interplead Beneficiary and Stranger.

Appellees attempt to meet this point in three ways:

1. **The Argument Is Made That Once the Jurisdictional Requirements of the Interpleader Act Are Met, the Right to Maintain the Action Is Absolute** (Baldwin Br. p. 5).

Reduced to its absurd but logical conclusion, this thesis would require the assertion that, jurisdictional requirements being met, interpleader could be maintained even though there had been an express written waiver of the right, or even though the plaintiff in interpleader were an insane person!

The fact of the matter is that our federal courts recognize the principle that there may be grounds—personal to the plaintiff—which disable him from bringing the action. Thus for example, the only Circuit Court case cited by Appellees under the heading of “*Bona Fides*” (Baldwin Br. pp. 9-10), *Hunter v. Federal Life Ins. Co.*, 111 F. 2d 551 (1940) (C. C. A. 8th), recognizes the fact that the action must be brought in *good faith*. As stated in the *Hunter* cases, *supra*, at page 556:

“It is our opinion that a stakeholder, *acting in good faith*,¹ may maintain a suit in interpleader for the purpose of ridding himself of the vexation and expense of resisting adverse claims, even though he believes that only one of them is meritorious.”

¹Emphasis supplied here and elsewhere.

So, too, other federal cases enunciate the proposition that where there is no reasonable doubt as to the proper payee, the action may not be maintained.

Calloway v. Miles, 30 F. 2d 14, 15 (1929) (C. C. A. 6th); (App. Op. Br. p. 35);

Mutual Life Ins. Co. of N. Y. v. Egeline, et al., 30 Fed. Supp. 738, 740, 741 (1939), D. C., N. D. of Calif. N. D. (App. Op. Br. p. 35).

Likewise, where the plaintiff is under an independent liability to one of the claimants, his right to bring interpleader is denied.

Boice v. Boice, et al., 48 Fed. Supp. 183, 186, D. C., D. N. J. (1943); aff'd 135 F. 2d 919 (C. C. A. 3rd) (App. Op. Br. p. 42).

The foregoing cases make it clear that "the question of the personal incapacity of a trustee-attorney to interplead his beneficiary-client with a hostile claimant is determined not by a meeting of the jurisdictional requirements of interpleader under the Act . . ." (App. Op. Br. p. 25.)

This would be true even though interpleader were considered (as asserted by appellees, Baldwin Br. pp. 6-8) a federal right. But, unlike the situation in *Holmberg v. Armbrrecht*, 327 U. S. 392, 66 Sup. Ct. 582 (1946) (Baldwin Br. p. 7), involving a suit to enforce the special liability of bank stockholders created by a federal law (Fed. Farm Loan Act, 39 Stat. 360, 374, 12 U. S. C., Sec. 812, 12 U. S. C. A., Sec. 812), interpleader under the Act is not a unique federal right.

This Court in *Massachusetts Mutual Life Ins. Co. v. Morris, et al.*, 61 F. 2d 104, 105 (1932) (C. C. A. 9th), approved the principle here involved in the following language quoted from *Mutual Life Ins. Co. v. Bondurant*, 27 F. 2d 464, 465 (C. C. A. 6th), cert. denied 278 U. S. 630, 49 S. Ct. 30, 73 L. Ed. 548:

“ ‘The Interpleader Act effects no important change in the substantive rights of parties to an interpleader suit; it merely enlarges the jurisdiction of federal courts over the necessary parties to certain interpleader suits.’ ”

To the same effect is:

Dee v. Kansas City Life Ins. Co., 86 F. 2d 813, 814 (1936) (C. C. A. 7th):

“Interpleader is a well-established equitable remedy existing long prior to the enactment of the Statute referred to [44 Stat. 416, 28 U. S. C. A., Sec. 41(26)]. The latter enactment did not enlarge the remedial function of the action, but merely extended the jurisdiction of federal courts to the circumstances described in the Act.”

Suffice it then, that the mere fact that the jurisdictional elements of interpleader are present, does not grant a trustee *carte blanche* to embroil his beneficiary in litigation with a stranger to the trust.

2. It Is Next Asserted That, Well After All—This Trust Isn't a Trust in the First Place (Baldwin Br. pp. 15-17; Rasberry Br. p. 2).

This strange assertion would seem to cast some reflection on the three sets of lawyers who drafted the instrument—Garfield, Baldwin & Vrooman; Burges, Burges, Scott, Rasberry & Hulse; and the attorneys for the Security-First National Bank of Los Angeles. It must be assumed that the attorneys (and their predecessors) represented by the appellees knew what they were doing—when, despite the many forms of settlement known to lawyers and the law—they advisedly created a trust agreement [Tr. pp. 46-52], complete with a conveyance in trust transferring title, the designation of trustees, prohibition against substitution of trustees except on stated conditions, designation of beneficiaries, place of preserving funds, and the clear statement that

“The trustees shall execute this trust without charge.”

The fact that it was not a trust for the investment and reinvestment of funds, as suggested by appellees (Baldwin Br. pp. 15-16), is completely immaterial.

“The point I wish to make is this. A trust can be created for any purpose which is not against public policy or otherwise illegal.” (*Scott on Trusts*, Vol. I, Sec. 59, p. 370.)

One can only conclude that the belated attempt to remove the trust label affixed to the instrument by appellees themselves, is a tacit confession of weakness.

3. Finally, Appellees Assert There Is Authority for a Trustee Interpleading Beneficiary and Hostile Claimant. (Baldwin Br. pp. 17-19.)

The cases cited do not support the contention:

(a) *Security Trust Co., etc. v. Woodward, et al.*, 73 Fed. Supp. 667 (D.C., S.D.N.Y., 1947) (Baldwin Br. pp. 17-18; App. Op. Br. p. 24), as pointed out in Appellant's Opening Brief, involved a *consenting beneficiary*. Though this is challenged by appellees (Baldwin Br. p. 18), it appears in the *Security Trust Co.* case that the beneficiary (Orator Frank Woodward) filed answer and cross-complaint, and that the motion to dismiss was filed by the stranger to the trust—Mary Trask Woodward.

(b) Neither *Blackmar v. Mackay, et al.*, 65 Fed. Supp. 48 (D.C., S.D., N.Y., 1946) (Baldwin Br. p. 18; App. Op. Br. p. 24) nor *Novinger Bank v. St. Louis Union Trust Co.*, 196 Mo. App. 335, 189 S. W. 826 (1916) involved strangers to the trust. As pointed out in Appellant's Opening Brief, the *Blackmar* case was a dispute *within the family* of trustee, settlor, and beneficiary. The *Novinger Bank* case was similarly a dispute *within the family*: between the trustee (under a corporate mortgage securing bonds) and two sets of beneficiaries (holders of the bonds).

(c) *United Building & Loan Ass'n v. Garrett*, 64 Fed. Supp. 460 (D.C., Ark., 1946) (Baldwin Br. p. 18) was not a case of interpleader brought by a trustee. The trustee was joined as a defendant and answered for the beneficiaries, thus performing the historic function of a trustee—at work for the bene-

ficiary, the antithesis of the trustee's role in the present action.

(d) *Warner v. Florida Bank & Trust Co.*, 160 F. 2d 766 (C.C.A. 5th, 1947) (Baldwin Br. p. 18), did not involve a trustee but an executor—type situation 2 (b) distinguished in Appellant's Opening Brief, pages 23-24.

(e) *Leber, et al. v. Ross, et al.*, 113 Atl. 606, 92 N. J. Eq. 535 (1921) (Baldwin Br. p. 19) did not involve an express trust. While at one point in the opinion the Court describes the fund holders as "trustees", the instrument involved makes no such statement, and is obviously lacking in the first essential of an express trust. The document—a receipt for \$450.00 as part of an escrow—recites that the money is held as "*security*." Hence there could be no title in the asserted trustee, a requisite of the trust relationship, and trust principles would not dictate the answer (see: *Scott on Trusts*, Vol. I, Section 2.2, p. 31). If the assignor performed, she was to get the \$450.00; if she failed to perform, the assignee was to get the money. The Court viewed the matter as an ordinary escrow: ". . . the position of complainants as custodians of part of the purchase price in this transaction is one of almost daily occurrence connected with the transfer of title to real estate . . ." (*Leber case, supra*, at p. 607.)

(f) In *Van Orden v. Anderson*, 122 Cal. App. 132, 92 Pac. 572 (1932) (Baldwin Br. p. 19) the trust had already terminated. As stated in the opinion at page 142:

" . . . nevertheless where the purposes of the trust have been accomplished, or the *trust*

otherwise terminated (which was clearly the situation here), . . .”

It is submitted that—on principle—the trustee’s duty of loyalty to his beneficiary bars an action of this sort, and that the argument on this point (App. Op. Br. pp. 23-30) has not been met by appellees.

II.

Action Not Brought in Good Faith.

1. The Trustee Has Already Rejected the Precise Claim Here Made.

In an attempt to extricate himself from the force of the above argument, Appellee Baldwin now asserts that when Appellee Rasberry’s claim for direct payment was rejected on June 3, 1947, the trustee had not seen the purported letter agreement of August 6, 1943, between Appellant and Appellee Rasberry (Baldwin Br. pp. 12, 13). *But this novel contention is flatly contradicted by the sworn statement of Appellee Baldwin himself:* [Baldwin Affidavit, Rep. Tr. pp. 76-77]:

“* * * that enclosed in the same envelope with said Exhibit 10 was another letter addressed to the Trustees from John L. Rasberry bearing date of May 31, 1947, and marked ‘Confidential’, a photostat of which letter is attached hereto and marked ‘Exhibit 11’; *that attached to said letter was a certain employment agreement and assignment executed by Marshall B. Stephenson as President of Hueco Cattle Company addressed to Burges, Burges, Scott, Rasberry & Hulse, assigning 15% of any sums realized by Palomas out of its claim made under the provisions of Public Law 814 in the event such matters are disposed of by litigation or settled by agreement*

‘after the filing of any suit or legal procedure’; that a photostat of said assignment is attached hereto and marked ‘Exhibit 12’; *that in reply to said letters of May 31, 1947, attached hereto as Exhibits 10 and 11, said James R. Garfield, as Trustee, under date of June 3, 1937 [sic], advised said John L. Rasberry that the disbursement of the funds collected from said claim ‘is to be made in accordance with the terms of the contract of October 29, 1943’; that a photostat of said letter is attached hereto and marked ‘Exhibit 13’; * * **”

2. The Action Is Not Brought in Good Faith.

(1) Appellees assert that by certain papers filed with appellant’s income tax returns, appellant admitted that an assignment had been made to Appellee Rasberry (Baldwin Br. p. 11; Rasberry Br. p. 3). Assuming the facts were as stated:

(a) There is not one shred of evidence in the entire record to indicate directly or indirectly that plaintiff had any knowledge of this matter when he filed suit, so it could not have affected in any respect his bona fides in bringing the action; and

(b) As pointed out both in argument [Tr. pp. 248-249] and in an affidavit of appellant’s president [Tr. p. 167], appellant feels very strongly that an attorney entrusted with a client’s confidential papers—to wit, income tax returns—violates his duty in disclosing the same, and that such matter does not rise to the dignity of “evidence” demonstrating the bona fides of either of appellees in bringing this action.

(2) Appellee Raspberry asserts—on the merits—that the letter of August 6, 1943, was in fact an assignment to him of a portion of appellant's award. Since, as pointed out, both appellees have acknowledged the impropriety of Appellee Raspberry's claim (App. Op. Br. pp. 32-34), it appears clear that this question—on the merits—had nothing to do with the bringing of the action. Nonetheless, since the point has been raised, what is the fact?

(a) The *conflicts* law of the forum governs (*Klaxon v. Stentor Mfg. Co.*, 313 U. S. 487, 61 S. Ct. 1020, 85 L. Ed. 1477).

(b) The conflicts law of the forum—California—specifies that since the alleged agreement fixes no place of performance, the law of the place of contracting governs (Civil Code, Sec. 1646).

(c) The agreement was made in Texas [Affidavit of Raspberry, Tr. p. 43].

(d) The Supreme Court of Texas, in rejecting the claim of an equitable assignment by a client's letter to the attorney reading in part “. . . we agree to give you as compensation therefor $\frac{1}{8}$ of the property recovered . . .”, enunciated the rule to be:

“In order that an agreement for a contingent fee may operate as an equitable assignment, there must be in effect a constructive appropriation of so much of the amount to be recovered as will confer upon the attorney a complete and present right to receive the same without the further intervention of the client.”

Carroll, et al. v. Hunt, 140 Tex. 424, 430, 168 S. W. 2d 238 (1943).

(e) In the instant case, it affirmatively appears that *intervention of appellant was required in each instance* by execution of vouchers and endorsement of checks (1) before any sum at all could be obtained from the United States Government, and (2) before any sum at all could be obtained by Appellee Rasberry [Affidavit of Rasberry, Tr. pp. 29-44; Affidavit of Baldwin, Tr. pp. 68-84].

(f) It is submitted, therefore, that under the governing Texas law, the alleged agreement could not in any event have constituted an assignment to Appellee Rasberry, and Appellee Baldwin did not in fact so regard it.

III.

Plaintiff Has "Unclean Hands."

Intentionally or otherwise, both appellees have ignored the point made in Appellant's Opening Brief, pp. 38-41, that the Rasberry letter of May 31, 1947, copy of which was allegedly sent to appellant, requested direct payment "*for convenience,*" but in the "confidential" letter segregation of a portion of appellant's funds was claimed as a matter of right. And this "confidential" letter was designed to be—and in fact was—concealed from the client-beneficiary. Reasoning backwards, from his present knowledge of the confidential tax return, Appellee Baldwin argues that he was under no duty "to relay information to appellant that was already within appellant's knowledge" (Baldwin Brief, p. 15). But even if there were any justification for presently considering that tax return, the plain fact is that at the time he was asked to build up a "record" for a stranger to the trust, he co-operated with the stranger in the belief that his beneficiary was not informed.

IV.

Award of Attorney's Fees and Costs Improper.

1. Appellees have failed to cite a single case where a federal court has granted attorney's fees to a plaintiff in interpleader, where the claim has been objected to on the ground of conflict with *the law of the forum*. In the only cases where the objection has been made, the award has been denied.

Danville Bldg. Assn. etc. v. Gates, et al., 66 Fed. Supp. 706, D. C., E. D. Ill. (1946);

Ill. Bankers Life Assur. Co. v. Blood, et al., 69 Fed. Supp. 705, 707, D. C. N. D. Ill. E. D. (1947) (App. Op. Br. p. 44).

While it is true that this and other Federal Courts have sanctioned attorneys' fees to the plaintiff in interpleader (Baldwin Brief, p. 23), in none of the cited cases was the instant point raised. On the contrary this Court has given clear indication that the rule as to attorneys' fees in federal interpleader is to be the same as the state rule. In *Massachusetts Mutual Life Ins. Co. v. Morris*, 61 F. 2d 104, 105 (1932) (C. C. A. 9th) (Baldwin Brief, p. 23), this Court quotes with approval the following:

“‘Nothing in the language or in the history of this essentially jurisdictional act evidences an intent that the rules as to costs and attorneys' fees in a statutory interpleader should be different from those that prevail in the ordinary equity interpleader *whether it be in the federal or state courts.*’”

2. As pointed out previously, *Van Orden v. Anderson*, 122 Cal. App. 132, 92 Pac. 572 (1932) (Baldwin Brief, p. 24) was not a case of interpleader by a trustee, since the trust there had already terminated. By the same token,

attorney's fees were awarded to the plaintiff—not as a plaintiff in interpleader, but to one who while acting as trustee had, prior to the interpleader action, rendered valuable services to the trust. The award was justified under Sections 2250 and 2273 of the Civil Code of California. Appellees do not bring themselves within the narrow scope of the *Van Orden* case, nor do they claim under the Civil Code of California. In any event the decision of the California Supreme Court in *Pacific Gas and Electric Co. v. Nakano, et al.*, 12 Cal. 2d 711, 715, 87 P. 2d 700 (1939) (App. Op. Br., p. 45) settles the California law denying attorney's fees to the plaintiff in interpleader.

3. *Prudential Ins. Co. of America v. Carlson*, 126 F. 2d 607 (C. C. A. 10th, 1942), cited by appellees (Baldwin Brief, p. 25) stands only for the proposition as noted—and ignored by appellees—that:

“ . . . failure of the Court to apply the *foreign* law may not be assigned as error for the first time on appeal.”

It is not thought that California law is *foreign* to a federal court sitting in California.

The dictum in *Great American Insurance Co. v. Glenwood Inv. Co.*, 265 Fed. 594 (C. C. A. 8th, 1920), cited by appellees (Baldwin Brief, p. 25) can have little weight, having been decided long prior to the paramount decision in *Erie Railway Co. v. Tompkins*, 304 U. S. 64, 82 L. Ed. 1188 (1938), and the cases stemming therefrom. Thus, for example, in *United States v. Certain Parcels of Land, etc.*, 144 F. 2d 626, 630 (C. C. A. 3rd, 1944), it is stated:

“Appellate Courts, of course, have always remanded cases when the trial courts have applied the law of the wrong jurisdiction. (*Klaxon v. Stentor*

Mfg. Co., 313 U. S. 487, 61 S. Ct. 1020, 85 L. Ed. 1477.) We think this should be done in this case, and it is immaterial that it was tried in the District Court on the theory that Pennsylvania law was to be applied. The appropriate law must be applied in each case and upon a failure to do so, Appellate Courts should remand the cause to the trial court to afford it opportunity to *apply appropriate law, even if the question was not raised in the court below.* *Pecheur Lozenge Co. vs. National Candy Co.*, 315 U. S. 666, 62 S. Ct. 853; 86 L. Ed. 1103.”

V.

The Transcript.

In a desire to have a transcript prepared which would be fair, not only to appellant but to each of the appellees and the reviewing Court, appellant requested preparation of the entire certified record. While it is true that formal portions of certain documents might have been eliminated, in numbers of instances even these are material to a correct picturing of the factual situation. Thus the distribution of copies on certain letters, *e. g.* Exhibits No. 10 [Tr. p. 108] and No. 18 [Tr. p. 119] to the Baldwin Affidavit, and the omission of distribution, *e. g.* Exhibit No. 11 to Baldwin Affidavit [Tr. p. 109] is vital. So, too, it was felt that inclusion of headings of letters facilitated a quick grasp of sequence. Likewise, where the same documents were attached to different affidavits, it was believed all should be reproduced to preserve continuity, and to permit rapid observation of the omissions of one affiant and the inclusions of another. If appellant has erred in the foregoing particulars, apology to this Court is freely made.

However, appellant is shocked and amazed at the criticism by appellees (Baldwin Brief, pp. 27, 28) of inclusion in the record of portions thereof referred to by appellant, portions referred to by appellee Baldwin, and portions referred to by appellee Raspberry. The following table is illustrative:

A. *Affidavit of Letha Metcalf.*

Reference: Appellant's Opening Brief, page 43.

B. *Additional Affidavit of Letha Metcalf.*

Reference: This Brief, page 9.

C. *Affidavit of Raspberry* [Tr. pp. 29-68] *exclusive of Exhibit "C"* [Tr. p. 53 and Tr. pp. 34, 38, and 43]:

Transcript	Cited in		
	Appellant's Opening Brief	Baldwin's Brief	Raspberry's Brief
Whole Affidavit (pp. 29-68)	p. 36		
All Exhibits (pp. 44-68)			p. 7
p. 30	p. 3		
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p. 57			p. 7
p. 59			p. 8
pp. 63, 65, 66			p. 7

D. “*A large portion of the lengthy affidavit of Arthur D. Baldwin*” [Tr. pp. 68-165].

Suffice it here to call attention to the fact that Appellant’s Opening Brief (p. 36) invited attention to the entire body of the affidavit; the Raspberry Brief (p. 7) refers to all of the 37 exhibits to the affidavit, and a casual glance makes clear that the Baldwin Brief is replete with reference to that “lengthy” document (see Baldwin Brief, pp. 2, 11, 12, 13, 14, 15, 16, and 19).

A wise law school professor once said:

“If you’re weak on the law, argue the facts, and if you’re weak on the facts, argue the law.”

He might well have added:

“If you’re weak on the law *and* the facts, criticize the transcript.”

VI.

Conclusion.

The briefs of appellees confirm appellant’s belief that this is a case “of first impression.” The declaration of this Court that a trustee’s duty of loyalty bars him from abandoning his beneficiary to interplead with a hostile stranger will be of vital import—not in this case alone, but will serve to strengthen confidence in the whole trust relationship so fundamental in the complex economic fabric of the nation. The apparent absence of *bona fide* doubt as to the disposition of the funds at issue, and the obvious cooperation between trustee and lawyer to the detriment of beneficiary and client serve further to demonstrate the

need for reversal. Apart from the terms of the trust itself, appellees have misconceived the nature of federal interpleader in assuming there is some federal-given right to attorneys' fees. As demonstrated by the case law, the right is governed by the rule of the forum—which bars the award.

The judgment should be reversed with directions to dissolve the injunction, dismiss the action, and order the return of the attorney's fees and costs.

Respectfully submitted,

ROLAND RICH WOOLLEY and

DAVID MELLINKOFF,

Attorneys for Appellant.

No. 12694

United States
Court of Appeals
for the Ninth Circuit.

HARRY THEODORE PETERSEN, IDA
PETERSEN, CLAYTON LEON DAIGLE
and AZILE CAROL DAIGLE, Individually
and as a Copartnership Doing Business as
"The Lodge," and STATE OF CALI-
FORNIA,

Appellants.

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court
Southern District of California,
Northern Division.

FILED
NOV - 3 1950



No. 12694

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE SOUTHERN DISTRICT OF
CALIFORNIA, NORTHERN DIVISION

No. 849-ND Civil

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HARRY THEODORE PETERSEN, IDA PETERSEN, CLAYTON LEON DAIGLE and AZILE CAROL DAIGLE, a Co-Partnership Doing Business as "The Lodge,"

HARRY THEODORE PETERSEN, IDA PETERSEN, CLAYTON LEON DAIGLE and AZILE CAROL DAIGLE, Individually,

JOHN DOE ONE, JANE DOE ONE, JOHN DOE TWO, JANE DOE TWO, a Co-Partnership

and

JOHN DOE ONE, JANE DOE ONE, JOHN DOE TWO and JANE DOE TWO, Individually,

Defendants.

COMPLAINT FOR INJUNCTION

[Violation of National Park Service Regulations]

Comes Now the United States of America and complains of the defendants, and each of them, and alleges as follows: [2*]

I.

That this is a suit of a civil nature brought by the

* Page numbering appearing at foot of page of original Reporter's Transcript of Record.

United States of America, that jurisdiction of this Court arises under the provisions of Title 28, Section 1345 of the United States Code, and that this Court has jurisdiction to hear and determine the within matter.

II.

That the defendants Harry Theodore Petersen, Ida Petersen, Clayton Leon Daigle and Azile Carol Daigle are residents of the State of California and reside within the Southern District of California, Northern Division.

III.

That the defendants John Doe One, Jane Doe One, John Doe Two and Jane Doe Two are sued herein under their fictitious names, their true names being unknown to plaintiff; that when their true names have been ascertained, plaintiff will ask leave of court to amend its complaint accordingly.

IV.

That the defendants do now operate, and have for some time past operated, a cocktail lounge, bar or saloon known as "The Lodge" wherein spirituous and intoxicating liquors, beer and wine are sold to the public.

V.

That "The Lodge" is located on Lots 11, 12 and 13 of Block 14 of General Grant Grove, Wilsonia Tract, Section 5, Township 14 South, Range 28 East, Mt. Diablo Meridian, California; that the defend-

ants are in possession of the above described real property and the buildings thereon.

VI.

That the above described property is located within the exterior boundaries of those certain tracts of land set aside and dedicated for park purposes by the United States of America as Kings Canyon National Park, California, by virtue of the Act of Congress dated March 4, 1940. [54 Stat. 41], Sec. 2, which reads as follows:

“Sec. 2. That the General Grant National Park is hereby abolished, and the west half of section 33, township 13 south, [3] range 28 east, and west half of section 4, all of section 8 and the northwest quarter of section 9, township 14 south, range 28 east, Mount Diablo Meridian, California, together with the lands formerly within the General Grant National Park, California, and particularly described as follows, to wit: All of sections 31 and 32, township 13 south, range 28 east, and sections 5 and 6, township 14 south, range 28 east, of the same meridian, are, subject to valid existing rights, hereby added to and made a part of the Kings Canyon National Park, and such lands shall be known as the General Grant grove section of the said park.”

VII.

That exclusive jurisdiction over the lands encompassed by the boundaries of the General Grant Na-

tional Park, all of which lands are now encompassed by the boundaries of the General Grant grove section of the Kings Canyon National Park, was ceded by the State of California to the United States of America Statutes, 1919, Chapter 51, Section 1, and by an Act of the Legislature of California approved April 7, 1943, known as Section 119 of the Government Code of California.

VIII.

That exclusive jurisdiction over the lands encompassed by the boundaries of the General Grant National Park, all of which lands are now encompassed by the boundaries of the General Grant grove section of the Kings Canyon National Park, was accepted by the government of the United States by the Act of Congress on June 2, 1920, 41 Stat. 731, 16 U.S.C. Section 57, and by letter dated April 21, 1945 from the Secretary of the Interior, Harold L. Ickes, written pursuant to the authority of the Act of Congress on October 9, 1940, 54 Stat. 1083, 40 U.S.C. Section 255, and in accordance with the requirements of Section 119 of the Government Code of California, to the Honorable Earl Warren, Governor of California, which was received and signed by the said Governor Earl Warren on April 25, [4] 1945.

IX.

That pursuant to the laws and statutes of the United States, the Secretary of the Interior is empowered and authorized to issue such regulations

as he deems necessary to carry out the purposes, functions, and administration of National Parks of the United States.

X.

That pursuant to the powers invested in him, the Secretary of the Interior of the United States, on October 24, 1947, published notice [12 Federal Register 6927] of a proposed rule to govern sale of intoxicating liquor on private lands in National Parks over which the United States exercises exclusive jurisdiction.

XI.

That pursuant to said notice, the Secretary of the Interior, on February 10, 1948, amended Title 36, Code of Federal Regulations, to add Section 12.8 [13 Federal Register 598-599] promulgating a regulation governing the sale of intoxicating liquors on private lands in National Parks over which the United States exercises exclusive jurisdiction.

XII.

That pursuant to Title 36, Code of Federal Regulations, Section 12.8, a permit, issued by the appropriate Regional Director, National Park Service, for the sale of alcoholic, spirituous, vinous, or fermented liquor, containing more than one per cent of alcohol by weight, is required.

XIII.

That the defendants sell alcoholic, spirituous,

vinous and/or fermented liquor containing more than one per cent of alcohol by weight.

XIV.

That the said defendants do not hold, nor have they ever held, a permit from the United States government or its agencies for the sale of said liquors, as required by Section 12.8 of Title 36, Code of Federal Regulations.

XV.

That on November 26, 1947, defendant Harry Theodore Petersen [5] applied to the Department of the Interior, Park Service, Regional Office, San Francisco, California, for a permit pursuant to the then proposed Section 12.8.

XVI.

That on March 3, 1948, the said Regional Office denied said application of the said Harry Theodore Petersen; that said defendant Petersen requested a reconsideration of his application and an oral hearing; that said request for reconsideration was withdrawn by his letter of May 3, 1948; that no appeal from said order of denial has been taken by the said Harry Theodore Petersen.

XVII.

That by letter dated July 27, 1948, from the Regional Director, National Park Service, San Francisco, to the defendant Harry Theodore Petersen,

the National Park Service advised defendant Petersen that the National Park Service did not recognize the jurisdiction of the State Board of Equalization, either to grant or deny liquor licenses to applicants whose premises are located within the boundaries of the Kings Canyon National Park, and that the sale of liquor at "The Lodge," Wilsonia Tract, Kings Canyon National Park, without a permit as required by Federal Regulations [13 F.R. 598 and 599; 36 C.F.R. 12.8], would subject said defendant Petersen and his co-defendants to prosecution.

XVIII.

That "The Lodge" is located in a small area of privately owned property consisting of a residential district composed almost exclusively of mountain summer homes; that there is but little State or County police protection in the area, as the nearest County police office is at Visalia, approximately fifty miles distant; that the National Park Service has a Park Ranger Station within one mile of Wilsonia; that the General Grant grove section of Kings Canyon National Park is maintained by the United States Government as a recreation area; and, that it is visited largely by family groups including children.

XIX.

That the unrestricted and unlicensed sale of intoxicating liquors in said national park, under the circumstances alleged in paragraph XVIII here-

in, [6] and in violation of Section 12.8 of Title 36, Code of Federal Regulations, constitutes a violation of law contravening public policy, and constituting a detriment to the public welfare and morals.

XX.

That great and irreparable injury will be done to the public welfare and morals, and the Government of the United States will be frustrated and hindered in its operation, control, and policing of the Kings Canyon National Park recreation area, unless these defendants are restrained and enjoined from operating said cocktail lounge, bar or saloon, and from selling alcoholic, spirituous, vinous and/or fermented liquors on the premises.

Wherefore, the plaintiff prays judgment against the defendants herein, and each of them, as follows:

1. That the said defendants be restrained and enjoined from the sale of alcoholic, spirituous, vinous, or fermented liquor at "The Lodge," or elsewhere within Kings Canyon National Park, without a permit from the United States Government as required by Section 12.8 of Title 36, Code of Federal Regulations;

2. That the real property upon which "The Lodge" is located, and as more particularly set forth in Paragraph V above, is subject to the exclusive jurisdiction of the United States of America;

3. That the plaintiff have its costs of suit incurred herein; and

4. That the plaintiff be granted such other and further relief as the Court may deem meet and proper in the premises.

JAMES M. CARTER,
United States Attorney,

CLYDE C. DOWNING,
Assistant U. S. Attorney,

/s/ MAX F. DEUTZ,
Assistant U. S. Attorney,
Attorneys for Plaintiff.

[Endorsed]: Filed August 5, 1949. [7]

[Title of District Court and Cause.]

ANSWER

Come now Henry Theodore Petersen, herein sued as Harry Theodore Petersen, Ida Petersen, Clayton Leon Daigle and Azile Carol Daigle, individually and as a copartnership, doing business as "The Lodge," and for answer to the Complaint of Plaintiff admit, [8] deny and allege as follows, to wit:

I.

Answering Paragraph I, the Defendants admit the allegations thereof.

II.

Answering Paragraph II, the Defendants admit the allegations thereof.

III.

Answering Paragraph IV, the Defendants admit the allegations thereof.

IV.

Answering Paragraph V, the Defendants deny that "The Lodge" is located on Lots 11, 12 and 13 of Block 14 of General Grant Grove, Wilsonia Tract, Section 5, Township 14 South, Range 28 East, Mt. Diablo Meridian, California, but in this connection allege that the lots described as Lots 11, 12 and 13 are situated in Block 13 of General Grant Grove, Wilsonia Tract, Section 5, Township 14 South, Range 28 East, Mt. Diablo Meridian, California, and further admit that the Defendants are in possession of the above-described real property and the buildings thereon.

V.

Answering Paragraph VI of said Complaint, these Defendants, and each of them, deny that any of the property of these Defendants, or any of them, described in said Complaint, is set aside or dedicated for park purposes by the United States of America, or at all; they and each of them deny that said property of these Defendants, or any of them, is any part of the Kings Canyon National Park or of General Grant National Park or of any park, and in this connection they and each of them allege that all of said property is the private property of these Defendants and not in any way a part of or

connected with Kings Canyon National Park or General Grant National Park or any park; these Defendants, and [9] each of them, further deny that the property of these Defendants, described in said Complaint, or any thereof, has been or is added to or made a part of Kings Canyon National Park or the General Grant Grove section of said park, or any park.

VI.

Answering Paragraph VII of said Complaint, these Defendants, and each of them, deny that exclusive or any jurisdiction over the lands of these Defendants, described in said Complaint in Paragraph V thereof, was ceded by the State of California to the United States of America by any Act of the Legislature as described in said Complaint, or at all or at any time, and in this connection these Defendants, and each of them, allege that the exclusive jurisdiction for all purposes over the lands of these Defendants, described in Paragraph V of said Complaint, is and at all times has been vested in the State of California; these Defendants, and each of them, in that respect, deny that the United States of America has exclusive or any jurisdiction over the lands or property of these Defendants, or either of them, mentioned in said Complaint.

VII.

Answering Paragraph IX, these Defendants admit the allegations thereof, but in this connection

these Defendants deny that the Secretary of Interior is empowered to issue any regulations insofar as it affects the property of the Defendants, privately owned by them and hereinabove referred to.

VIII.

Answering Paragraph X, the Defendants admit the allegations thereof, and in this connection allege that the Secretary of Interior of the United States had no power to effect any regulations over the private lands and property of these Defendants within the exterior of the National Park herein referred to, and further deny that the United States had exclusive jurisdiction [10] over the lands and property owned by these Defendants and hereinabove referred to.

IX.

Answering Paragraph XI, the Defendants admit the allegations thereof, but in this connection the Defendants deny that the Secretary of Interior had any jurisdiction whatsoever over the private lands and property of these Defendants within the exterior boundaries of Kings Canyon National Park.

X.

Answering Paragraph XIII, the Defendants admit the allegations thereof.

XI.

Answering Paragraph XIV, the Defendants admit the allegations thereof.

XII.

Answering Paragraph XVII, the Defendants admit the allegations thereof.

XIII.

Answering Paragraph XVIII, the Defendants admit the allegations thereof, and in this connection further allege that the property of the Defendants, as well as the residential area, is visited by the general public at large, and that the residential district therein mentioned is on privately owned land and within the exterior of Kings Canyon National Park.

XIV.

Answering Paragraph XIX, the Defendants generally and specifically deny all, each and every allegation therein contained.

XV.

Answering Paragraph XX, the Defendants generally and specifically deny all, each and every allegation therein contained.

Wherefore, Defendants pray as follows:

1. That the Plaintiff take nothing by reason of its Complaint; [11]
2. That the relief sought be denied; and
3. That the Court by its judgment decree that

the Plaintiff has no jurisdiction over the lands and property of the Defendants.

GEORGE, WINKLER & GIBBS,

By /s/ ELMORE WINKLER,

Attorneys for Defendants.

Duly verified.

Affidavit of service by mail attached.

[Endorsed]: Filed August 27, 1949. [12]

[Title of District Court and Cause.]

STIPULATION PERMITTING STATE OF
CALIFORNIA TO INTERVENE AS DE-
FENDANT; AND ORDER PERMITTING
STATE OF CALIFORNIA TO INTERVENE
AS PARTY DEFENDANT

Whereas, in the above-entitled matter it is the contention of the plaintiff that the plaintiff has exclusive jurisdiction over the privately owned property of the defendants, which property is situated in what is known as Wilsonia Village, which is located within Section 5 of Township 14 South, Range 28 East, Mount Diablo Base and Meridian, and which area is entirely surrounded by the General Grant Grove section of Sequoia—Kings Canyon National Park, and the defendants named herein contend that the plaintiff does not have exclusive jurisdiction but on the other hand that the State of California has exclusive jurisdiction, and

Whereas, the State of California is not now a party defendant, but claims that it has exclusive jurisdiction over said privately owned land, and [15]

Whereas, the State of California may be bound by judgment in the action, and

Whereas, the claim of the State of California has questions of law and fact in common with the defense of the defendants named herein,

It is therefore stipulated by the parties hereto through their respective counsel that pursuant to the provisions of Rule 24 that the State of California may intervene herein as a party defendant; and the parties hereto, subject, however, to the discretion of the court, waive the presentation to the court of a formal motion to intervene as provided by subdivision (c) of Rule 24.

Dated: October 7, 1949.

JAMES M. CARTER,
United States Attorney.

CLYDE C. DOWNING,
Assistant United States
Attorney.

/s/ MAX F. DEUTZ,
Assistant United States
Attorney,
Attorneys for Plaintiff.

GEORGE, WINKLER AND
GIBBS,
/s/ ELMORE WINKLER,
Attorneys for Defendants
Petersen, et al.

FRED N. HOWSER,

Attorney General of the State
of California.

/s/ BAYARD RHONE,

Deputy Attorney General. Attorneys for State of
California, Defendant and Intervenor. [16]

By the Court:

Good cause appearing therefor, it is hereby
ordered that the State of California may, and leave
is hereby granted to, intervene in this proceeding
as a party defendant.

October 11, 1949.

/s/ WM. C. MATHES,

District Judge.

[Endorsed]: Filed October 11, 1949. [17]

[Title of District Court and Cause.]

PETITION IN INTERVENTION AND AN-
SWER OF THE STATE OF CALIFORNIA

Comes now the State of California, with leave first
obtained by the court, and files this Petition in
Intervention; and in answer to the complaint on
file herein admits, denies and alleges as follows:

I.

Admits the allegations contained in Paragraph I.

II.

Admits the allegations contained in Paragraph II.

III.

Admits the allegations contained in Paragraph III.

IV.

In answer to Paragraph IV this defendant and intervenor denies each and every allegation thereof except as said allegations are specifically alleged or admitted herein, and in this [18] connection alleges the true facts to be that on or about April 15, 1948, the defendant Harry Theodore Petersen and one H. L. Edmunds applied to the State Board of Equalization of the State of California for a seasonal on-sale beer and wine and on-sale distilled spirits licenses, pursuant to the provisions of the Alcoholic Beverage Control Act of the State of California; that on July 22, 1948, said seasonal licenses as applied for were issued to said individuals by the State Board of Equalization and said licenses have been in full force and effect at all times subsequent to July 22, 1948, and that said individuals named have been doing business pursuant to said licenses; that the establishment operated by said individuals is known as "The Lodge" and that spirituous and intoxicating liquors and beers and wines are sold on the premises.

V.

In answer to Paragraph V, this defendant and

intervenor denies generally and specifically each and every allegation thereof, but alleges in this connection the true facts to be that the lots described as lots 11, 12 and 13 are situated in Block 13 of General Grant Grove, Wilsonia Tract, Section 5, Township 14 South, Range 28 East, Mount Diablo Base and Meridian, California, and further admit that some of the individual defendants named herein are in possession of the above-described real property and the buildings thereon.

VI.

In answer to Paragraph VI, defendant and intervenor admits that section 2 of an act of Congress, dated March 4, 1940, (54 Stats. 41) reads as set forth in the complaint, but denies generally and specifically each and every other allegation in said Paragraph VI, and in this connection denies that any of the property of the defendants named herein is set aside or dedicated for [19] park purposes by the United States of America; and in this connection alleges further that there is in the vicinity of what is known as General Grant Grove, formerly known as General Grant National Park, a tract of land known as Wilsonia Village, which tract of land comprises approximately 120 acres of land within Section 5, Township 14 South, Range 28 East, Mount Diablo Base and Meridian, and is a part of a tract of 160 acres of said Section 5, which was originally patented by the United States Government on October 15, 1891, to one Daniel M. Perry; that said Wil-

sonia Tract has remained in private ownership since the issuance of said patent; that said tract of land has been divided into approximately 250 parcels, including the said lots 11, 12 and 13, of Block 14, alleged herein, and all of said parcels of property have been at all times since the issuance of said patent, and are now, in private ownership and since 1891 none of said Wilsonia Tract has ever been or now is owned by the United States of America.

VII.

Denies generally and specifically each and every allegation contained in Paragraph VII, but in this connection alleges the true facts to be as follows: That exclusive jurisdiction over that particular land, the title to which is vested in the United States of America was ceded by the state of California to the United States of America by California Statutes of 1919, Chapter 51, Section 1, and by the act of the Legislature of California, approved April 7, 1943, and known as section 119 of the Government Code of California; that the United States of America does not and never has had title to any of that property referred to herein as Wilsonia Tract subsequent to October 15, 1891; that exclusive jurisdiction for all purposes over said Wilsonia Tract is and at all times mentioned since September 9, 1850, has been and remained vested in the State of California. [20]

VIII.

In answer to Paragraph VIII the defendant and intervenor denies generally and specifically each and every allegation thereof, but alleges the true facts to be as follows: That exclusive jurisdiction over the land, title to which is vested in the United States of America and within the boundaries of what is known as General Grant Grove of Kings Canyon National Park, was accepted by the government of the United States by the Act of Congress on June 2, 1920 (41 Stats. 731, 16 U.S.C. Sec. 57), and by letter dated April 21, 1945, from the Secretary of the Interior, written pursuant to the authority of the Act of Congress of October 9, 1940 (54 Stats. 1083, 40 U.S.C. Sec. 255), and in accordance with the requirements of section 119 of the Government Code of California, to the Governor of California, which was received and signed by said Governor on April 25, 1945.

IX.

Admit the allegations of Paragraph IX, but in this connection defendant and intervenor denies that the Secretary of the Interior is empowered to issue any regulations in so far as they affect property located in the tract known as Wilsonia Village, which is privately owned, and title to which is not vested in the United States of America.

X.

In answer to Paragraph X the defendant and

intervenor admits the allegations thereof, but in this connection alleges that the Secretary of the Interior has no power whatever to make any regulations affecting the private lands and property situated in Wilsonia Village, and denies that the United States of America exercises exclusive jurisdiction over any of the privately owned lands in said tract known as Wilsonia Village. [21]

XI.

In answer to Paragraph XI the defendant and intervenor admits the allegations thereof, but in this connection the defendant denies that the Secretary of the Interior has any jurisdiction whatever over private lands and property located in Wilsonia Village within the exterior boundaries of Kings Canyon National Park, and denies that the United States exercises exclusive jurisdiction over any of said privately owned lands.

XII.

In answer to Paragraph XII the defendant admits the allegations thereof in so far as said allegations refer to lands owned by the United States of America, located in National Parks; but denies said allegations if they are intended to refer to privately owned lands.

XIII.

Admits the allegations contained in Paragraph XIII.

XIV.

Admits the allegations contained in Paragraph XIV.

XV.

Admits the allegations contained in Paragraph XV.

XVI.

Admits the allegations contained in Paragraph XVI.

XVII.

Admits the allegations of Paragraph XVII, but in this connection alleges further that on or about April 15, 1948, defendants Harry Theodore Petersen and H. L. Edmunds applied for seasonal on-sale beer and wine and on-sale distilled spirits licenses to be issued under the Alcoholic Beverage Control Act for said premises concerned herein; that thereafter a protest was filed on behalf of the National Park Service, United States Department of the Interior, objecting to the issuance of the license, on the [22] alleged ground that the United States claimed exclusive jurisdiction over private lands in Kings Canyon National Park; that thereafter said matter was duly and regularly heard by a hearing officer for said Board of Equalization on May 10, 1948, pursuant to the provisions of subdivision (c) of section 11517 of the Government Code; that thereafter and on or about June 4, 1948, said matter was regularly heard by the Board of Equalization of the State of California, and

said matter came on again regularly for hearing before said Board on July 22, 1948, pursuant to notice given to the parties thereto, including the Regional Counsel for National Park Service, and after consideration thereof the State Board of Equalization issued said licenses; that no appeal from said order has been taken.

XVIII.

Admits the allegations contained in Paragraph XVIII.

XIX.

In answer to Paragraph XIX the defendant and intervenor denies generally and specifically each and every allegation contained therein and in this connection alleges further that in said proceedings before the State Board of Equalization the said Board of Equalization found, pursuant to the provisions of Article XX, section 22 of the Constitution of California that the issuance of said licenses would not be contrary to public welfare and morals.

XX.

Denies generally and specifically each and every allegation contained in Paragraph XX.

Wherefore, the defendant and intervenor prays that the plaintiff take nothing by its action; that the court determine [23] that the plaintiff has no jurisdiction over the privately owned lands in said

Wilsonia Village, and the defendants go hence with their costs incurred herein.

FRED N. HOWSER,
Attorney General.

/s/ BAYARD RHONE,
Deputy Attorney General,
Attorneys for State of California, Intervenor and
Defendant.

Duly verified.

Receipt of Copy acknowledged.

[Endorsed]: Filed October 11, 1949. [24]

GOVERNMENT'S EXHIBIT NO. 1

[Title of District Court and Cause.]

STIPULATION OF FACTS FOR PURPOSES
OF TRIAL

It is hereby stipulated by and between the parties hereto, through their respective counsel, Ernest A. Tolin, United States Attorney, and Clyde C. Downing and Max F. Deutz, Assistant United States Attorneys, for the plaintiff, George, Winkler and Gibbs by Elmore Winkler for the defendants Peteren, et al., Fred Howser, Attorney General, and Bayard Rhone, Deputy Attorney General, for the defendant, State of California, and Stammer and McKnight by Walter H. Stammer for the defendants Cutler and Neff, et al., that the following Stipulation of Facts are agreed as the Facts to

be admitted without objection as evidence for the purpose of trial subject to the reservations set forth in Paragraph XXXI and XXXII hereof.

Now Therefore It Is Stipulated that

I.

The defendants Henry Theodore Petersen, Ida Petersen, Clayton Leon Daigle and Azile Carol Daigle are a copartnership which does now operate, and has for some time past operated, a cocktail lounge and restaurant known as "The Lodge," wherein spirituous and intoxicating liquors, beer, wine and food are sold to the public.

II.

The defendants Petersen and Daigle are citizens and residents of the State of California and are the successors in interest of a partnership consisting of Henry Theodore Petersen and H. L. Edmunds, which formerly owned and operated "The Lodge."

III.

"The Lodge" is located on Lots 11, 12 and 13 of Block 13 of Wilsonia Tract, in Section 5, Township 14 South, Range 28 East, Mount Diablo Base and Meridian, in the County of Tulare, State of California, according to the map thereof on file and of record in the office of the County Recorder of said County of Tulare, State of California, in Book 16, of Maps, at page 20. The defendants Petersen and Daigle are in possession of the above

described real property and the buildings thereon. That said defendants Petersen also own Lot A of said Wilsonia Tract. Wilsonia Tract, Mesa Addition to Wilsonia Tract, and Sierra Masonic Family Club Tract are residence tracts located on approximately 120 acres of land within Section 5, Township 14 South, Range 28 East, Mount Diablo Base and Meridian, and are known generally as 'Wilsonia Village.' The lands upon which said tracts are situate are a part of a tract of 160 acres in said Section 5 which was originally patented by the United States Government on October 15, 1891, to one Daniel M. Perry. The area included in said Wilsonia Tract, Mesa Addition to Wilsonia Tract and Sierra Masonic Family Club Tract has remained in private ownership since the issuance of said patent, and said tracts have been divided into approximately 500 parcels. The real property of the defendants hereinabove described and the real property of intervenors [28] A. R. Cutler, John D. Neff and Elsa A. Neff, et al., hereinafter described has been at all times since the issuance of said patent, and now is, in private ownership; and at all times since 1891 none of said Wilsonia Tract, or Mesa Addition to Wilsonia Tract, or Sierra Masonic Family Club Tract has ever been, or now is, owned by the United States of America, except for the southerly portions of Lots 132, 133, 134, 135, 136, 137, 138, 139, 140, 155, 156, 157, 158, 186, 167, 171, 172, 177B, 177A, deeded to private owners by the United States of America, pursuant to 56 Stat. 310. Attached hereto, marked

Exhibit "A" is a map of the said 120-acre area, showing said Wilsonia Tract, Mesa Addition to Wilsonia Tract, and Sierra Masonic Family Club Tract. Attached hereto as Exhibit "B" is a map of Section 5, showing thereon the tract of approximately 160 acres originally patented by the United States Government on October 15, 1891, to Daniel M. Perry showing thereon the areas included in Wilsonia Tract, Mesa Addition to Wilsonia Tract, and Sierra Masonic Family Club Tract, and two tracts of land formerly in private ownership which have been purchased, and are now owned by the United States.

IV.

An Act of the Legislature of the State of California approved April 15, 1919 (Cal. Statutes 1919, Ch. 51, Sec. 1), provides as follows:

"Section 1. Exclusive jurisdiction shall be and the same is hereby ceded to the United States over and within all of the territory which is now or may hereafter be included in those several tracts of land in the State of California set aside and dedicated for park purposes by the United States as "Yosemite national park," "Sequoia national park," and "General Grant national park," respectively; saving, however, to the State of California the right to serve civil or criminal process within the limits of the aforesaid parks in suits or prosecutions for or on account of rights acquired, obligations incurred or crimes committed in said state outside of said parks; and saving further, to

the said state the right to tax persons and corporations, their franchises and property on the lands included in said parks, and the right to fix and collect license fees for fishing in said parks; and saving also to the persons residing in any of said parks now or hereafter the right to vote at all elections held within the county or counties in which said parks are situate; provided, however, that jurisdiction shall not vest until the United States through the proper officer notifies the State of California that they assume police jurisdiction over said parks."

V.

An Act of Congress of June 2nd, 1920 (41 Stats. 731), 16 U.S.C.A. 57, provides as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of the act of the Legislature of the State of California (approved April 15, 1919), ceding to the United States exclusive jurisdiction over the territory embraced and included within the Yosemite National Park, Sequoia National Park, and General Grant National Park, respectively, are hereby accepted and sole and exclusive jurisdiction is hereby assumed by the United States over such territory, saving, however, to the said State of California the right to serve civil or criminal process within the limits of the aforesaid parks or either of them in suits or prosecutions for or on account of rights

acquired, obligations incurred, or crimes committed in said State outside of said parks; and saving further to the said State the right to tax persons and corporations, their franchises and property on lands included in said parks, and the rights to fix and collect license fees for fishing in said parks; and saving also to the persons residing in any of said parks now or [30] hereafter the right to vote at all elections held within the county or counties in which said parks are situated. All the laws applicable to places under sole and exclusive jurisdiction of the United States shall have force and effect in said parks or either of them. All fugitives from justice taking refuge in said parks, or either of them, shall be subject to the same laws as refugees from justice found in the State of California."

VI.

Section 2 of an Act of Congress dated March 4, 1940 (54 Stats. 41), 16 U.S.C.A. 80a, provides as follows:

"Sec. 2. That the General Grant National Park is hereby abolished, and the west half of section 33, township 13 south, range 28 east, and west half of section 4, all of section 8, and the northwest quarter of section 9, township 14 south, range 28 east, Mount Diablo Meridian, California, together with the lands formerly within the General Grant National Park, California, and particularly described as follows to wit: All of sections 31 and 32, Township 13 south, range 28 east and sections 5 and 6, township 14 south, range 28 east, of the same meridian, are, sub-

ject to valid existing rights, hereby added to and made a part of the Kings Canyon National Park, and such lands shall be known as the General Grant grove section of the said park.”

VII.

An Act of the Legislature of the State of California approved April 7, 1943, known as Section 119 of the Government Code of California, provides as follows:

“Cession of exclusive jurisdiction to United States: Lands in Kings Canyon National Park: Reservations: When [31] jurisdiction vests. Exclusive jurisdiction shall be and the same is hereby ceded to the United States over and within all of the territory which is now or may hereafter be included in those several tracts of land in the State of California set aside and dedicated for park purposes by the United States as “Kings Canyon National Park”; saving however to the State of California the right to serve civil or criminal process within the limits of the aforesaid park in suits or prosecutions for or on account of rights acquired, obligations incurred, or crimes committed in said State outside of said park; and saving further to the said State the right to tax persons and corporations, their franchises and property on the lands included in said park, and the right to fix and collect license fees for fishing in said park; and saving also to the persons residing in said park now or hereafter the right to vote at all elections held within the county or counties in which said park is situate.

The jurisdiction granted by this section shall not vest until the United States through the proper officer notifies the State of California that it assumes police jurisdiction over said park."

VIII.

The following is a letter dated April 21, 1945, from the Secretary of the Interior, Harold L. Ickes, to the Honorable Earl Warren, Governor of California, which was received and signed by the said Governor Earl Warren on April 25, 1945:

"Notice is hereby given, in accordance with the provisions of the act of October 9, 1940 (54 Stat. 1083; 40 U.S.C. Sec. 255), that, effective as of the 1st day of June, 1945, at 12 m., Pacific War Time, the United [32] States accepts exclusive jurisdiction over all lands now included in Kings Canyon National Park. These lands are particularly described in the act of March 4, 1940 (54 Stat. 41), establishing the park, and in proclamation No. 2411, issued by the President of the United States on June 21, 1940 (54 Stat. 2710; 3 CFR, CUM. SUPP., 163), adding certain lands to the park under authority contained in section 2 of the said act.

"Exclusive jurisdiction was ceded to the United States by the act of the Legislature of California, approved April 7, 1943, (Sec. 119 of the Government Code of California) and in accordance with the requirements of this act you are notified that the United States assumes police jurisdiction over the said park as of the date and time above stated.

“It is requested that you endorse the attached duplicate original of this notice of acceptance, indicating the date and time of its receipt, and return it to this Department. There is enclosed for your convenience a self-addressed envelope which requires no postage.”

Said letter was recorded on May 16, 1945, in the office of the County Recorder of the County of Tulare, State of California.

IX.

That there are a large number of small parcels of privately owned land scattered throughout Kings Canyon National Park and other National Parks in California; that the privately owned tracts in Kings Canyon and Sequoia National Parks are set forth on a map attached hereto as Exhibit “C.”

X.

The Secretary of the Interior of the United States on October 24, 1947, published notice (12 Fed. Register 6927) of a proposed rule to govern the sale of intoxicating liquor on private lands in National Parks over which the United States exercises exclusive jurisdiction. [33]

XI.

Pursuant to said notice, the Secretary of the Interior on February 10, 1948, amended Title 36, Code of Federal Regulations, to add Section 12.8 (13 Fed. Register 498-599), providing among other things as follows:

“Sec. 12.8—Intoxicating Liquors. (a) No alcoholic, spirituous, vinous, or fermented liquor, containing more than one percent of alcohol by weight, shall be sold on any privately-owned lands within any of the national parks listed in Sec. 12.1 unless a permit for the sale thereof has first been secured from the appropriate regional director as designated in Secs. 01.30 and 01.82 of this chapter.

“(b) In granting or refusing applications for permits as herein provided, the regional directors shall take into consideration (1) the character of the neighborhood, (2) the availability of other liquor-dispensing facilities, (3) the local laws governing the sale of liquor, and (4) any other local factors which, to their judgment, have a relationship to the privilege requested.

“(c) A fee will be charged for the issuance of such a permit, corresponding to that charged for the exercise of similar privileges outside the national park boundaries by the local State Government, or appropriate political subdivision thereof within whose exterior boundaries the place covered by the permit is situated.

“(d) The applicant or permittee may appeal to the Director, National Park Service, from any final action of the appropriate regional director as designated in Secs. 01.30 and 01.82 of this chapter, refusing, conditioning or revoking the permit. Such an appeal, in writing, shall be filed within twenty days after receipt of notice by [34] the applicant or permittee of the action appealed from. Any

final decision of the Director may be appealed to the Secretary of the Interior within 15 days after receipt of notice by applicant or permittee of the Director's decision."

XII.

The defendants Petersen and Daigle, doing business as "The Lodge," sell alcoholic, spirituous, vinous and/or fermented liquors containing more than one per cent of alcohol by weight.

XIII.

The defendants Petersen and Daigle do not hold, nor have they or their predecessors in interest at "The Lodge," Henry Theodore Petersen and H. L. Edmunds, ever held, a permit from the United States Government or its agencies for the sale of said liquors.

XIV.

On November 26, 1947, defendant Henry Theodore Petersen applied to the Department of the Interior, Park Service, Regional Office, San Francisco, California, for a permit pursuant to the then proposed Section 12.8.

XV.

On March 3, 1948, the said Regional Office denied said application of the said Henry Theodore Petersen; the said defendant Petersen requested a reconsideration of his application and an oral hearing; said request for reconsideration was withdrawn on May 3, 1948; and no appeal from said order of

denial has been taken by the said Henry Theodore Petersen.

XVI.

On or about April 15, 1948, the defendant Henry Theodore Petersen and one H. L. Edmunds applied to the State Board of Equalization of the State of California for seasonal on-sale beer and wine and on-sale distilled spirits licenses, pursuant to the provisions of the Alcoholic Beverage Control Act of the State of California; and thereafter a protest was filed on behalf of the National Park Service, United States Department of the Interior, objecting to [35] the issuance of said licenses, on the ground that the United States claimed exclusive jurisdiction over private lands in Kings Canyon National Park. Said matter was duly and regularly heard by a hearing officer for said Board of Equalization on May 10, 1948, pursuant to the provisions of subdivision (c) of Section 11517 of the Government Code; and thereafter, on or about June 4, 1948, said matter was regularly heard by the Board of Equalization of the State of California; and said matter came on again regularly for hearing before said Board on July 22, 1948, pursuant to notice given to the parties thereto, including the Regional Counsel for the National Park Service; and after consideration thereof, the State Board of Equalization on July 22, 1948, issued the seasonal licenses as applied for. Said licenses have been in effect at all times subsequent to July 22, 1948, and said individuals name, and/or their successors

in interest, the defendants Petersen and Daigle, have been doing business pursuant to said licenses. The establishment operated by said individuals and their successors in interest, the defendants Petersen and Daigle, is known as "The Lodge."

XVII.

By letter dated July 27, 1948, from the Regional Director, National Park Service, San Francisco, to the defendant Henry Theodore Petersen, the National Park Service advised defendant Petersen that the National Park Service did not recognize the jurisdiction of the State Board of Equalization either to grant or deny liquor licenses to applicants whose premises are located within the boundaries of the Kings Canyon National Park, and that the sale of liquor at "The Lodge," Wilsonia Tract, Kings Canyon National Park, without a permit as required by Federal Regulations (13 F. R. 598 and 599; 36 C.F.R. 12.8), would subject said defendant Petersen and his codefendants to prosecution.

XVIII.

"The Lodge" is located in an area of privately-owned property consisting of a residential district known as "Wilsonia Village," composed almost exclusively of mountain summer homes, and is visited by the general [36] public at large.

The properties of the defendants and the properties of the defendants in intervention are located on privately-owned land.

XIX.

Wilsonia Village, as above described, is located within the exterior boundaries of Tulare County, California.

XX.

The nearest police officer, sheriff, or constable of Tulare County, to the Wilsonia Village, is located at Three Rivers, a distance of forty-two miles from "The Lodge." The National Park Service has a Park Ranger Station within one-half mile of "The Lodge."

XXI.

The National Park Service has fire-fighting equipment, consisting of two pump trucks, located in General Grant Grove, approximately one-half mile from Wilsonia Village. Wilsonia Fire District is a district organized under the laws of the State of California, which includes only the privately-owned areas hereinabove and hereinafter described, solely for the purpose of furnishing fire protection to said privately-owned areas; and annual assessments are levied upon the privately-owned lands in said Fire District for such purpose. By agreement between the County of Tulare, said Fire District and the California State Department of Forestry, a fire engine is maintained at Wilsonia for the protection of privately-owned property in said area, including the property of defendants and defendants in intervention, and the assessments levied by said Fire District are devoted to the maintenance and operation of said fire engine.

XXII.

The General Grant Grove section of Kings Canyon National Park is maintained by the United States Government as a recreation area, and it is visited largely by family groups including children.

XXIII.

Less than five families live at Wilsonia the year around and maintain legal residence there. [37]

XXIV.

All of said privately-owned property hereinabove and hereinafter described is within Sierra Union School District in the County of Tulare, State of California, which maintains a school at Badger, in said District.

Up until about 1945, a public school was operated by a State School District at General Grant Grove. Said school was located on government-owned land and attended by children from families residing on both government and privately-owned land. Said school was discontinued when it fell below the required minimum enrollment.

XXV.

There are 243 owners of homes located on said privately-owned land in Wilsonia Village, and defendants in intervention Cutler and Neff represent approximately 63 of said home owners in this proceeding.

XXVI.

Defendant in intervention A. R. Cutler is a citizen and resident of the State of California and is the owner in fee of Lots 109, 110, 112, 113, 114 and 115 in Mesa Addition to Wilsonia Tract, in Section 5, Township 14 South, Range 28 East, Mount Diablo Base & Meridian, according to the map thereof on file and of record in the office of the County Recorder of the County of Tulare, State of California, in Book 17 of Maps, at page 2, and a house and other buildings thereon.

XXVII.

Defendants in intervention Johney D. Neff and Elsa A. Neff, husband and wife, are the owners in fee as joint tenants of Lot 185 of said Mesa Addition to Wilsonia Tract, in Section 5, Township 14 South, Range 28 East, Mount Diablo Base & Meridian, according to the map thereof on file and of record in the office of the County Recorder of the County of Tulare, State of California, in Book 17 of Maps, at page 2, except the north 25 feet of said lot used for road purposes, and a house and other structures thereon, and they make their home on and are permanent residents of said Lot 185 and are citizens of the State of California. Said defendants in intervention Johney D. Neff and Elsa A. Neff vote [38] in Eshom voting precinct of the County of Tulare, State of California, which includes all of the privately-owned lands herein described and the polling place of which is at Sierra Union District School at Badger, Tulare County, California, that Gov-

ernment employees and others residing within Kings Canyon National Park vote at general county and state elections at said polling place, that a copy of the Voters Register of Tulare County is attached hereto marked Exhibit "D."

XXVIII.

That Government employees and others residing within Sequoia National Park vote at general county and state elections at Three Rivers in Tulare County.

XXIX.

That there are three polling places located on Government land within Yosemite National Park, two in Yosemite Valley and one at Wawona, where approximately 200 Government employees and approximately 200 Park Company employees and civilians, are registered to vote, that a certified copy of the Voters Register of Mariposa County is attached hereto as Exhibit "E."

XXX.

The defendants in intervention A. R. Cutler, Johney D. Neff and Elsa A. Neff do not own, have no interest in, and have never been in possession of "The Lodge," the business carried on therein, or the land and buildings upon which it is located.

XXXI.

Any party to this stipulation may object to the introduction in evidence of any fact stated in this

stipulation in paragraphs XIV, XV, XVI, XX, XXI, and XXVIII and XXIX hereof, upon the ground that it is incompetent, irrelevant or immaterial.

XXXII.

This stipulation shall not prevent any party thereto from introducing in evidence any fact not herein agreed upon which is admissible under the rules of evidence, providing that notice of intent to introduce any such evidence be served upon the other parties on or before five days before the date fixed for trial. [39]

XXXIII.

The defendants and the defendants in intervention Cutler and Neff claim and contend that if the statutes hereinabove referred to have the effect of ceding exclusive jurisdiction by the State of California to the United States of America over the privately-owned lands hereinabove described, they are void and in violation of the Constitution of the United States and the Constitution of the State of California. Said defendants and defendants in intervention also claim and contend that the Secretary of the Interior has no power to make or issue regulations governing or affecting the said privately-owned lands hereinabove described. Nothing in this stipulation shall be deemed to be a waiver of those claims and contentions.

Dated: This 26th day of November, 1949.

ERNEST A. TOLIN,
United States Attorney.

CLYDE C. DOWNING,
Assistant U. S. Attorney
Chief, Civil Division.

MAX F. DEUTZ,
Assistant U. S. Attorney.

By /s/ MAX F. DEUTZ,
Attorneys for Plaintiff.

GEORGE, WINKLER AND
GIBBS,

By /s/ ELMORE WINKLER,
Attorneys for Defendants
Petersen, et al.

FRED N. HOWSER,
Attorney General of the
State of California.

BAYARD RHONE,
Deputy Attorney General.

By /s/ BAYARD RHONE,
Attorneys for Defendant in Intervention State of
California.

STAMMER & McKNIGHT,

By /s/ W. H. STAMMER,
Attorneys for Defendants in Intervention A. R.
Cutler, et al.

At a stated term, to wit: The October Term A. D. 1949, of the District Court of the United States of America, within and for the Northern Division of the Southern District of California, held at the Court Room thereof, in the City of Fresno on Tuesday the 6th day of December in the year of our Lord one thousand nine hundred and forty-nine.

Present: The Honorable Wm. C. Mathes,
District Judge.

[Title of Cause.]

ORDER CAUSE SUBMITTED ON BRIEFS

For hearing motion of defendants in intervention, A. R. Cutler, et al., filed Nov. 30, 1949, for order permitting said defendants to file amendment to their answer in intervention; Max F. Deutz, Ass't U. S. Att'y, appearing as counsel for Gov't.; Elmore Winkler, Esq., appearing as counsel for defendants Petersen, et al.; Bayard Rhone, Deputy Att'y Gen'l of State of Calif., appearing as counsel for defendant in intervention, the State of California; and W. H. Stammer, Esq., appearing as counsel for defendants in intervention, A. R. Cutler, et al.;

Attorney Stammer makes a statement re filing of amendment to their answer in intervention, and Court grants the said motion, and orders that amendment to answer in intervention of A. R. Cutler, et al., be filed.

Stipulation of facts for purposes of trial, filed Dec. 5, 1949, is admitted into evidence as Gov't Ex. 1. Gov't Ex. 1-A, 1-B, 1-C, 1-D, and 2 are ad-

mitted in evidence. Gov't rests at 10:43 p.m. Defense also rests.

At 10:47 a.m. Attorney Deutz argues to the Court. At 11:12 a.m. court recesses for five minutes.

At 11:35 a.m. court reconvenes herein and all being present as before, including counsel for both sides; [41]

Attorney Rhone argues to the Court, Attorney Winkler argues to the Court, and at noon Attorney Stammer argues to the Court. Court makes a statement.

Court orders cause submitted on briefs; Gov't to file opening brief by Dec. 23, 1949; the State of California, defendant and intervener, allowed to Jan. 10, 1950, to reply; and Gov't to file closing brief by Jan. 20, 1950, if so advised; the case then to stand submitted. [42]

United States District Court for the
Southern District of California
Central Division

No. 849 ND Civ.

UNITED STATES OF AMERICA,
Plaintiff,
vs.

HARRY THEODORE PETERSEN, et al.,
Defendants.

STATE OF CALIFORNIA,
Defendant in Intervention,

A. E. CUTLER, et al.,
Defendants in Intervention.

MEMORANDUM OF DECISION

By this action the United States seeks [1] a declaratory judgment decreeing that the federal government has exclusive police jurisdiction over privately owned lands located within the boundaries of Kings Canyon National Park and [2] a writ of injunction restraining sale of liquor upon [43] such private property without prescribed federal permit. [28 U.S.C. §§ 1345, 2201.] The cause is submitted for decision upon an agreed statement of facts.

National Park Service regulations issued pursuant to statute by the Secretary of the Interior [36 Code Fed. Regs. § 12.8 (1949); see 39 Stat. 535 (1916), 16 U.S.C. § 3] provide that “no alcoholic

. . . liquor, containing more than one per cent of alcohol by weight, shall be sold on any privately-owned [sic] lands within . . . [Kings Canyon National Park] unless a permit for the sale thereof has first been secured from the . . . regional director."

Defendants sell liquor "containing more than one per cent of alcohol by weight" at their establishment, "The Lodge," located in "Wilsonia Village" on a tract of privately owned land within the boundaries of General Grant grove section of the park. Their application for a federal permit was refused by the regional director, but defendants hold a seasonal on-sale liquor license from the California State Board of Equalization. Against the assertion that the United States has exclusive jurisdiction to regulate the sale of liquor on their land, defendants continue to sell under claimed authority of state license. [44]

Thus an "actual controversy," justiceable in this court, exists between the United States and the defendants. [28 U.S.C. § 2201; *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227 (1937); cf. *Eccles v. Peoples Bank*, 333 U.S. 426 (1948).] Other residents and owners of land in "Wilsonia Village" have now intervened in the action, as has the State of California. [Fed. R. Civ. P. 24(b).]

By Act of March 4, 1940 [54 Stat. 41, 16 U.S.C. § 80] the Congress "dedicated and set apart as a public park, to be known as the Kings Canyon National Park," a tract of land located in California. General Grant National Park [see 41 Stat. 731 (1920); Cal. Stats. 1919, c. 51] was abolished and the area within

it was, "subject to valid existing rights, . . . added to and made a part of the Kings Canyon National Park"—the "General Grant grove section of the said park." [54 Stat. 43, 16 U.S.C. § 80a.] This congressional enactment establishing the park included lands owned by defendants and the individual intervenors within the boundaries of the area so "dedicated and set apart as a public park."

California thereafter ceded to the United States "exclusive jurisdiction . . . over and within all [45] of the territory which is now or may hereafter be included in those several tracts of land in the State of California set aside and dedicated for park purposes by the United States as 'Kings Canyon National Park'; saving however . . . the right to serve . . . process . . . the right to tax persons and corporations, their franchises and property on the lands included . . . and the right to fix and collect license fees for fishing in said park; and saving also to the persons residing in said park now or hereafter the right to vote at all elections held within the county or counties in which said park is situate"; the jurisdiction thereby granted to vest when "the United States through the proper officer notifies the State of California that it assumes police jurisdiction over said park." [Cal. Stats. 1943, c. 96, § 2, Cal. Gov. Code § 119.]

By letter of April 21, 1945, to the Governor of California, the Secretary of the Interior accepted on behalf of the United States "exclusive jurisdiction over all the lands now included in Kings Canyon National Park" and gave notice that the United

States then assumed "police jurisdiction over the said park." [See 54 Stat. 1083 (1940), 40 U.S.C. § 255.] [46]

California thus purported to cede to the United States police jurisdiction "over and within all of the territory . . . included in those several tracts of land set aside and dedicated for park purposes . . . as 'Kings Canyon National Park.'" And the Secretary of the Interior then purported to accept on behalf of the United States "exclusive jurisdiction over all the lands now included in Kings Canyon National Park."

The Government urges that exclusive police jurisdiction of the United States over all lands included within the boundaries of Kings Canyon National Park, both publicly and privately owned, is established by this agreement between the United States and California. [Collins v. Yosemite Park Co., 304 U.S. 518, 529 (1938).]

Neither in the congressional act of dedication, nor in the legislative act of cession, nor in the executive act of acceptance, is any mention made of privately owned tracts of land such as "Wilsonia Village." Admittedly the lands owned by defendants and the individual intervenors are not "set aside and dedicated for park purposes" [see 54 Stat. 41, 43 (1940), 16 U.S.C. §§ 80, 80a]; but it is equally beyond [47] question that "Wilsonia Village" is, in the language of the California Legislature, "included in those several tracts of land in the State of California set aside and dedicated for park purposes by

the United States as 'Kings Canyon National Park.' "

Although 54 Stat. 1083 (1940), 40 U.S.C. § 255, pursuant to which the Secretary of the Interior acted on behalf of the United States, authorizes the head of a department only to accept "cession of . . . jurisdiction, exclusive or partial, not heretofore obtained, over . . . lands or interests [under his immediate jurisdiction, custody, or control] . . .," this statute merely provides a method of accepting a cession of jurisdiction *Adams v. United States*, 319 U.S. 312, 314 (1943)] and is not to be construed to limit either as to character or ownership the lands over which federal jurisdiction may be assumed.

It seems clear therefore that California intended to cede and the United States intended to accept exclusive police jurisdiction over the privately owned lands in question. [*United States v. Unzeuta*, 281 U.S. 138, 143 (1930); cf. *Arlington Hotel Co. v. Fant*, 278 U.S. 439 (1929); [48] *Fort Leavenworth R.R. v. Lowe*, 114 U.S. 525 (1885).]

Defendants and intervenors contend however that California cannot by compact constitutionally cede, and that the United States cannot constitutionally accept exclusive jurisdiction over lands in California to which the United States has no title.

The Constitution of California permits such a cession of jurisdiction by the state. [See *Johnson v. Morrill*, 20 Cal. 2d 446, 126 P. 2d 873, 877 (1942); *Standard Oil Co. v. Johnson*, 10 Cal. 2d 758, 76 P. 2d 1184, 1188 (1938); cf. *Fort Leavenworth R.R. v.*

Lowe, *supra*, 114 U.S. 525, 541; Chicago & Pac. Ry. v. McGlinn, 114 U.S. 542, 546 (1885); Rhode Island v. Massachusetts, 12 Pet. (37 U.S.) 657, 725 (1838).]

The Constitution of the United States expressly grants exclusive federal "authority over all places purchased . . . for the erection of forts . . . and other needful buildings." [U.S. Const. Art. I, § 8, cl. 17; see Madison, *Journal of the Constitutional Convention* 662 (Scott ed. 1893).] And it is now settled that the federal government may by compact with a state assume exclusive police jurisdiction over any federal lands [49] within the state. [Collins v. Yosemite Park Co., *supra*, 304 U.S. 518, 529; Fort Leavenworth R.R. v. Lowe, *supra*, 114 U.S. 525.]

Moreover it is held that where "necessary in order to secure the benefits intended to be derived" from federal lands, acceptance of exclusive police jurisdiction by the United States may extend to privately owned land. [United States v. Unzeuta, *supra*, 281 U.S. 138, 145; cf. Arlington Hotel Co. v. Fant, *supra*, 278 U.S. 439.] Since the privately owned land at bar is entirely surrounded by public lands dedicated for national park purposes "to conserve the scenery and the natural and historic objects and the wildlife therein" [39 Stat. 535 (1916), 16 U.S.C. § 1], the conclusion follows that acceptance by the United States of exclusive police jurisdiction over such privately owned land was "necessary in order to secure the benefits intended to be derived" from the park.

The individual intervenors urge that the effect

of so holding will deprive them of their right to vote and other state rights, including their right to state fire protection, without due process of law. But California's cession of [50] jurisdiction expressly saved the voting rights of persons residing in the park. It does not befall this court to "labor to find an inference which would deprive them of the right of suffrage." [Johnson v. Morrill, *supra*, 20 Cal. 2d 446, 126 P. 2d 873, 877.] As to the loss of state rights such as fire protection, the federal government is always charged with the duty of protecting rights and property of its citizens [see *Helvering v. Gerhardt*, 304 U.S. 405, 412 (1938)], so there is no lack of due process here. [cf. *Rhode Island v. Massachusetts*, *supra*, 12 Pet. (37 U.S.) 657, 725.]

The United States had authority to and did accept from California cession of exclusive police jurisdiction over the privately owned lands in controversy [United States v. Unzeuta, *supra*, 281 U.S. 138]; and is entitled to judgment so decreeing.

The Government also prays for an injunction restraining defendants from selling liquor at "The Lodge" without federal permit. The United States would be entitled to the injunction sought, if such a remedy were necessary to prevent irreparable injury to federal property rights, to protect the [51] general welfare or to abate a public nuisance. [*Light v. United States*, 220 U.S. 523 (1911); *In re Debs*, 158 U.S. 564, 583-587 (1895).]

However, criminal sanctions are provided for violation of National Park Service regulations [36 Code Fed. Regs. §§ 1-34] issued by the Secretary of

the Interior [39 Stat. 535 (1916), as amended, 16 U.S.C. § 3], and such regulations have the force of law. [See *Yakus v. United States*, 321 U.S. 414, 435 (1944).] It does not appear that the acts of defendants at bar constitute anything more than a violation of such regulations. The criminal remedy at law is therefore adequate. [cf. *Hecht Co. v. Bowles*, 321 U.S. 321 (1944).]

While existence of another adequate remedy does not preclude declaratory relief [Fed. R. Civ. P. 57; *Delno v. Market St. Ry.*, 124 F. 2d 965, 968 (9th Cir. 1942)], the extraordinary remedy of injunction is not warranted where as here there is an adequate criminal remedy. [*Milliken v. Stone*, 16 F. 2d 981, 983 (2d Cir. 1927), cert. denied, 274 U.S. 748 (1927); cf. *In re Debs*, supra, 158 U.S. 564, 593; see Chafee, *Progress in the Law—Equitable Relief Against Torts*, 34 Harv. L. Rev. 388, 398-405 (1921).] Accordingly the prayer [52] for an injunction will be denied.

Solicitors for plaintiff will submit findings of fact, conclusions of law and form of declaratory judgment pursuant to local rule 7 within ten days.

June 22, 1950.

/s/ WM. C. MATHES,

United States District Judge.

[Endorsed]: Filed June 22, 1950.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on regularly for trial before the Court sitting without a jury on December 6, 1949, Ernest A. Tolin, United States Attorney, Clyde C. Downing and Max F. Deutz, Assistant United States Attorneys, appearing as attorneys for the plaintiffs, George, Winkler and Gibbs by Elmore W. Winkler appearing for the defendants Harry Theodore Petersen, et al., Fred N. Howser, Attorney General of the State of California by Bayard Rhone appearing for the defendant in intervention, the State of California, and Stammer and McKnight by W. H. Stammer appearing for the defendants in intervention, A. R. Cutler, et al., and the parties having stipulated to all of the facts in this proceeding, and the Court having examined the stipulations of fact and the exhibits offered by the parties, and the Court being fully advised in the premises, finds the facts to be as follows: [54]

Findings of Fact

I.

That this action is brought by the United States of America, and that the jurisdiction of this Court arises, under the provisions of Title 28, Section 1345 of the United States Code; that an actual controversy between the parties exists.

II.

That the defendants Henry Theodore Petersen, Ida Petersen, Clayton Leon Daigle and Azile Carol Daigle are a copartnership which does now operate, and has for some time past operated, a cocktail lounge and restaurant known as "The Lodge," wherein spirituous and intoxicating liquors, beer, wine and food are sold to the public.

III.

That the defendants Petersen and Daigle are citizens and residents of the State of California and are the successors in interest of a partnership consisting of Henry Theodore Petersen and H. L. Edmunds, which formerly owned and operated "The Lodge."

IV.

That "The Lodge" is located on Lots 11, 12 and 13 of Block 13 of Wilsonia Tract, in Section 5, Township 14 South, Range 28 East, Mount Diablo Base and Meridian, in the County of Tulare, State of California, according to the map thereof on file and of record in the office of the County Recorder of said County of Tulare, State of California, in Book 16, of Maps, at page 20. The defendants Petersen and Daigle are in possession of the above described real property and the buildings thereon. That said defendants Petersen also own Lot A of said Wilsonia Tract. Wilsonia Tract, Mesa Addition to Wilsonia Tract, and Sierra Masonic Family Club Tract are residence tracts located on approxi-

mately 120 acres of land within Section 5, Township 14 South, Range 28 East, Mount Diablo Base and Meridian, and are known generally as "Wilsonia Village." The lands upon which said tracts are situate are a part of a tract of 160 acres in said Section 5 which was originally patented by the United States Government on October 15, 1891, to one Daniel M. Perry. The area included in said Wilsonia Tract, Mesa Addition to Wilsonia Tract and Sierra [55] Masonic Family Club Tract has remained in private ownership since the issuance of said patent, and said tracts have been divided into approximately 500 parcels. The real property of the defendants hereinabove described and the real property of intervenors A. R. Cutler, Johnney D. Neff and Elsa A. Neff, et al., hereinafter described has been at all times since the issuance of said patent, and now is, in private ownership; and at all times since 1891 none of said Wilsonia Tract, or Mesa Addition to Wilsonia Tract, or Sierra Masonic Family Club Tract has ever been, or now is, owned by the United States of America, except for the southerly portions of Lots 132, 133, 134, 135, 136, 137, 138, 140, 155, 156, 157, 158, 186, 167, 171, 172, 177B, 177A, deeded to private owners by the United States of America, pursuant to 56 Stat. 310. Exhibit "1-A" in Evidence is a map of the said 120-acre area, showing said Wilsonia Tract, Mesa Addition to Wilsonia Tract, and Sierra Masonic Family Club Tract. Exhibit "1-B" in Evidence is a map of Section 5, showing thereon the tract of approximately 160 acres originally patented by the United States

Government on October 15, 1891, to Daniel M. Perry showing thereon the areas included in Wilsonia Tract, Mesa Addition to Wilsonia Tract and Sierra Masonic Family Club Tract, and two tracts of land formerly in private ownership which have been purchased, and are now owned, by the United States.

V.

That an Act of the Legislature of the State of California approved April 15, 1919 (Cal. Statutes 1919, Ch. 51, Sec. 1), provides as follows:

“Section 1. Exclusive jurisdiction shall be and the same is hereby ceded to the United States over and within all of the territory which is now or may hereafter be included in those several tracts of land in the State of California set aside and dedicated for park purposes by the United States as “Yosemite national park,” “Sequoia national park,” and “General Grant national park,” respectively; saving, however, to the State of California [56] the right to serve civil or criminal process within the limits of the aforesaid parks in suits or prosecutions for or on account of rights acquired, obligations incurred or crimes committed in said state outside of said parks; and saving further, to the said state the right to tax persons and corporations, their franchises and property on the lands included in said parks, and the right to fix and collect license fees for fishing in said parks; and saving also to the persons residing in any of said parks now or hereafter the right to vote at all elections held within the county or counties in

which said parks are situate; provided, however, that jurisdiction shall not vest until the United States through the proper officer notifies the State of California that they assume police jurisdiction over said parks.”

VI.

That an Act of Congress of June 2nd, 1920 (41 Stats. 731), 16 U.S.C.A. 57, provides as follows:

“Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of the act of the Legislature of the State of California (approved April 15, 1919), ceding to the United States exclusive jurisdiction over the territory embraced and included within the Yosemite National Park, Sequoia National Park, and General Grant National Park, respectively, are hereby accepted and sole and exclusive jurisdiction is hereby assumed by the United States over such territory, saving, however, to the said State of California the right to serve civil or criminal process within the limits of the afore-said parks or either of them in suits or prosecutions for or on account of rights acquired, obligations [57] incurred, or crimes committed in said State outside of said parks; and saving further to the said State the right to tax persons and corporations, their franchises and property on lands included in said parks, and the right to fix and collect license fees for fishing in said parks; and saving also to the persons residing in any of said parks now or hereafter the right to vote at all elections held within the county

or counties in which said parks are situated. All the laws applicable to places under sole and exclusive jurisdiction of the United States shall have force and effect in said parks or either of them. All fugitives from justice taking refuge in said parks, or either of them, shall be subject to the same laws as refugees from justice found in the State of California."

VII.

That Section 2 of an Act of Congress dated March 4, 1940 (54 Stats. 41), 16 U.S.C.A. 80a, provides as follows:

"Sec. 2. That the General Grant National Park is hereby abolished, and the west half of section 33, township 13 south, range 28 east, and west half of section 4, all of section 8, and the northwest quarter of section 9, township 14 south, range 28 east, Mount Diablo Meridian, California, together with the lands formerly within the General Grant National Park, California, and particularly described as follows, to-wit: All of sections 31 and 32, township 13 south, range 28 east, and sections 5 and 6, township 14 south, range 28 east, of the same meridian, are, subject to valid existing rights, hereby added to and made a part of the Kings Canyon National Park, and such lands shall be known as the General Grant Grove section of said park." [58]

VIII.

That an Act of the Legislature of the State of California approved April 7, 1943, known as Sec-

tion 119 of the Government Code of California, provides as follows:

“Cession of exclusive jurisdiction to United States: Lands in Kings Canyon National Park: Reservations: When jurisdiction vests. Exclusive jurisdiction shall be and the same is hereby ceded to the United States over and within all of the territory which is now or may hereafter be included in those several tracts of land in the State of California set aside and dedicated for park purposes by the United States as “Kings Canyon National Park;” saving however to the State of California the right to serve civil or criminal process within the limits of the aforesaid park in suits or prosecutions for or on account of rights acquired, obligations incurred, or crimes committed in said State outside of said park; and saving further to the said State the right to tax persons and corporations, their franchises and property on the lands included in said park, and the right to fix and collect license fees for fishing in said park; and saving also to the persons residing in said park now or hereafter the right to vote at all elections held within the county or counties in which said park is situate. The jurisdiction granted by this section shall not vest until the United States through the proper officer notifies the State of California that it assumes police jurisdiction over said park.”

IX.

That the following is a letter dated April 21, 1945, from the Secretary of the Interior, Harold L. Ickes,

to the Honorable Earl Warren, [59] Governor of California, which was received and signed by the said Governor Earl Warren on April 25, 1945:

“Notice is hereby given, in accordance with the provisions of the act of October 9, 1940 (54 Stat. 1083; 40 U.S.C. Sec. 255) that, effective as of the 1st day of June, 1945, at 12 m., Pacific War Time, the United States accepts exclusive jurisdiction over all lands now included in Kings Canyon National Park. These lands are particularly described in the act of March 4, 1940 (54 Stat. 41), establishing the park, and in proclamation No. 2411, issued by the President of the United States on June 21, 1940 (54 Stat. 2710; 3 CFR, CUM. SUPP., 163), adding certain lands to the park under authority contained in section 2 of the said act.

“Exclusive jurisdiction was ceded to the United States by the act of the Legislature of California, approved April 7, 1943 (Sec. 119 of the Government Code of California) and in accordance with the requirements of this act you are notified that the United States assumes police jurisdiction over the said park as of the date and time above-stated.

“It is requested that you endorse the attached duplicate original of this notice of acceptance, indicating the date and time of its receipt, and return it to this Department. There is enclosed for your convenience a self-addressed envelope which requires no postage.”

Said letter was recorded on May 16, 1945, in the office of the County Recorder of the County of Tulare, State of California.

X.

That there are a large number of small parcels of privately owned land scattered throughout Kings Canyon National Park and other National Parks in California; that the privately owned tracts in Kings Canyon and Sequoia National Parks are set forth on a map admitted in evidence as Exhibit "1-C."

XI.

That the Secretary of the Interior of the United States on October 24, 1947, published notice (12 Fed. Register 6927) of a proposed rule to govern the sale of intoxicating liquors on private lands in National Parks over which the United States exercises exclusive jurisdiction.

XII.

That pursuant to said notice, the Secretary of the Interior on February 10, 1948, amended Title 36, Code of Federal Regulations, to add Section 12.8 (13 Fed. Register 498-599), providing among other things as follows:

"Sec. 12.8—Intoxicating Liquors. (a) No alcoholic, spirituous, vinous, or fermented liquor, containing more than one per cent of alcohol by weight, shall be sold on any privately-owned lands within any of the national parks listed in Sec. 12.1 unless a permit for the sale thereof has first been secured from the appropriate regional director as designated in Secs. 01.30 and 01.82 of this chapter.

“(b) In granting or refusing applications for permits as herein provided, the regional directors shall take into consideration (1) the character of the neighborhood, (2) the availability of other liquor-dispensing facilities, (3) the local laws governing the sale of liquor, and (4) any other local factors which, to their judgment, have a relationship to the privilege requested.

“(c) A fee will be charged for the issuance of such a permit, corresponding to that charged for the exercise of similar privileges outside the national park boundaries by the local State Government, or appropriate political subdivision thereof within whose exterior boundaries the place covered by the permit is situated. [61]

“(d) The applicant or permittee may appeal to the Director, National Park Service, from any final action of the appropriate regional director as designated in Secs. 01.30 and 01.82 of this chapter, refusing, conditioning or revoking the permit. Such an appeal, in writing, shall be filed within twenty days after receipt of notice by the applicant or permittee of the action appealed from. Any final decision of the Director may be appealed to the Secretary of the Interior within 15 days after receipt of notice by applicant or permittee of the Director's decision.”

XIII.

That the defendants Petersen and Daigle, doing business as “The Lodge,” sell alcoholic, spirituous,

vinous and fermented liquors containing more than one per cent of alcohol by weight.

XIV.

That the defendants Petersen and Daigle do not hold, nor have they or their predecessors in interest at "The Lodge," Henry Theodore Petersen and H. L. Edmunds, ever held, a permit from the United States Government or its agencies for the sale of said liquors.

XV.

That on November 26, 1947, defendant Henry Theodore Petersen applied to the Department of the Interior, Park Service, Regional Office, San Francisco, California, for a permit pursuant to the then proposed Section 12.8.

XVI.

That on March 3, 1948, the said Regional Office denied said application of the said Henry Theodore Petersen; the said defendant Petersen requested a reconsideration of his application and an oral hearing; said request for reconsideration was withdrawn on May 3, 1948; and no appeal from said order of denial has been taken by the said Henry Theodore Petersen. [62]

XVII.

That on or about April 15, 1948, the defendant Henry Theodore Petersen and one H. L. Edmunds applied to the State Board of Equalization of the

State of California for seasonal on-sale beer and wine and on-sale distilled spirits licenses, pursuant to the provisions of the Alcoholic Beverage Control Act of the State of California; and thereafter a protest was filed on behalf of the National Park Service, United States Department of the Interior, objecting to the issuance of said licenses, on the ground that the United States claimed exclusive jurisdiction over private lands in Kings Canyon National Park. Said matter was duly and regularly heard by a hearing officer for said Board of Equalization on May 10, 1948, pursuant to the provisions of subdivision (c) of Section 11517 of the Government Code; and thereafter, on or about June 4, 1948, said matter was regularly heard by the Board of Equalization of the State of California; and said matter came on again regularly for hearing before said Board on July 22, 1948, pursuant to notice given to the parties thereto, including the Regional Counsel for the National Park Service; and after consideration thereof, the State Board of Equalization on July 22, 1948, issued the seasonal licenses as applied for. Said licenses have been in effect at all times subsequent to July 22, 1948, and said individuals named, and their successors in interest, the defendants Petersen and Daigle, have been doing business pursuant to said licenses. The establishment operated by said individuals and their successors in interest, the defendants Petersen and Daigle, is known as "The Lodge."

XVIII.

That by letter dated July 27, 1948, from the Regional Director, National Park Service, San Francisco, to the defendant Henry Theodore Petersen, the National Park Service advised defendant Petersen that the National Park Service did not recognize the jurisdiction of the State Board of Equalization either to grant or deny liquor licenses to applicants whose premises are located within the boundaries of the Kings Canyon National Park, and that the sale of liquor at "The Lodge," Wilsonia Tract, Kings Canyon National Park, [63] without a permit as required by Federal Regulations (13 F.R. 598 and 599; 36 C.F.R. 12.8), would subject said defendant Petersen and his codefendants to prosecution.

XIX.

That "The Lodge" is located in an area of privately-owned property consisting of a residential district known as "Wilsonia Village," composed almost exclusively of mountain summer homes, and is visited by the general public at large.

The properties of the defendants and the properties of the defendants in intervention are located on privately-owned land.

XX.

That Wilsonia Village, as above described, is located within the exterior boundaries of Tulare County, California.

XXI.

That the National Park Service has fire-fighting equipment, consisting of two pump trucks, located in General Grant Grove, approximately one-half mile from Wilsonia Village. Wilsonia Fire District is a district organized under the laws of the State of California, which includes only the privately-owned areas hereinabove and hereinafter described, solely for the purpose of furnishing fire protection to said privately-owned areas; and annual assessments are levied upon the privately-owned lands in said Fire District for such purpose. By agreement between the County of Tulare, said Fire District and the California State Department of Forestry, a fire engine is maintained at Wilsonia for the protection of privately-owned property in said area, including the property of defendants and defendants in intervention, and the assessments levied by said Fire District are devoted to the maintenance and operation of said fire engine.

XXII.

That General Grant Grove section of Kings Canyon National Park is maintained by the United States Government as a recreation area, and it is visited largely by family groups including children.

XXIII.

That less than five families live at Wilsonia the year around and maintain legal residence there.

XXIV.

That all of said privately-owned property hereinabove and hereinafter described is within Sierra Union School District in the County of Tulare, State of California, which maintains a school at Badger, in said District.

Up until about 1945, a public school was operated by a State School District at General Grant Grove. Said school was located on government-owned land and attended by children from families residing on both government- and privately-owned land. Said school was discontinued when it fell below the required minimum enrollment.

XXV.

That there are 243 owners of homes located on said privately-owned land in Wilsonia Village, and defendants in intervention Cutler and Neff represent approximately 63 of said home owners in this proceeding.

XXVI.

That defendant in intervention A. R. Cutler is a citizen and resident of the State of California and is the owner in fee of Lots 109, 110, 112, 113, 114 and 115 in Mesa Addition to Wilsonia Tract, in Section 5, Township 14 South, Range 28 East, Mount Diablo Base & Meridian, according to the map thereof on file and of record in the office of the County Recorder of the County of Tulare, State of California, in Book 17 of Maps, at page 2, and a house and other buildings thereon.

XXVII.

That defendants in intervention Johney D. Neff and Elsa A. Neff, husband and wife, are the owners in fee as joint tenants of Lot 185 of said Mesa Addition to Wilsonia Tract, in Section 5, Township 14 South, Range 28 East, Mount Diablo Base & Meridian, according to the map thereof on file and of record in the office of the County Recorder of the County of Tulare, State of California, in Book 17 of Map, at page 2, except the north 25 feet [65] of said lot used for road purposes, and a house and other structures thereon, and they make their home on and are permanent residents of said Lot 185 and are citizens of the State of California. Said defendants in intervention Johney D. Neff and Elsa A. Neff vote in Eshom voting precinct of the County of Tulare, State of California, which includes all of the privately-owned lands herein described and the polling place of which is at Sierra Union District School at Badger, Tulare County, California, that Government employees and others residing within Kings Canyon National Park vote at general county and state elections at said polling place, that a copy of the Voters Register of Tulare County is admitted in evidence as Exhibit "1-D."

XXVIII.

That Government employees and others residing within Sequoia National Park vote at general county and state elections at Three Rivers in Tulare County.

XXIX.

That the defendants in intervention A. R. Cutler, Johnney D. Neff and Elsa A. Neff do not own, have no interest in, and have never been in possession of "The Lodge," the business carried on therein, or the land and buildings upon which it is located.

XXX.

That the defendant in intervention A. R. Cutler is now, and has been for several years prior to the commencement of this action, over the age of twenty-one years, a citizen of the United States, a resident of the State of California and of the County of Tulare in said State, able to read the Constitution of the State of California in the English language and to write his name, and he is not an idiot or insane person and has not been convicted of any infamous crime or of the embezzlement or misappropriation of public money.

XXXI.

That the defendants in intervention Johnney D. Neff and Elsa A. Neff are, and have been for several years prior to the commencement of this action, citizens of the United States, residents of the State of [66] California and of the County of Tulare in said State, and residents of Eshom Voting Precinct in said County of Tulare. Each of said defendants in intervention is over the age of twenty-one years, able to read the Constitution of the State of California in the English language and to write his or

ner name, and neither of said defendants in intervention is an idiot or insane person or has been convicted of any infamous crime or of the embezzlement or misappropriation of public money.

XXXII.

That a bona fide entry of the 160 acres in said Section 5, Township 14 South, Range 28 East, Mount Diablo Base and Meridian, 120 acres of which were later subdivided as Wilsonia Tract, Mesa Addition to Wilsonia Tract and Sierra Masonic Family Club Tract, was made by Daniel M. Perry prior to October 1st, 1890; and said land so entered by him was the land patented to him by the United States Government on October 15, 1891.

XXXIII.

That Congress reserved and withdrew from settlement all government-owned lands in General Grant Park, including said Section 5, by an Act of Congress of October 1, 1890 (26 St., Ch. 1263, Sec. 3, P. 650).

XXXIV.

That cession by the State of California and acceptance by the United States of exclusive police jurisdiction over the privately-owned land, known as "Wilsonia Village," located in Section 5, Township 14 South, Range 28 East, Mount Diablo Base and Meridian, and lying within the boundaries of Kings Canyon National Park, was at the time of such cession and now is necessary in order to secure

the benefits intended to be derived from the publicly-owned land dedicated and set aside for park purposes as Kings Canyon National Park.

Conclusions of Law

From the Foregoing Findings of Fact the Court makes the following Conclusions of Law:

I.

That the State of California has ceded to the United States of America exclusive jurisdiction over all territory, publicly and privately owned, within [67] the exterior boundaries of Kings Canyon National Park, saving, however, those certain incidents of jurisdiction specifically reserved in the statute of cession, Section 119 of the Government Code of California, enacted April 7, 1943.

II.

That the United States of America has accepted exclusive jurisdiction over all territory, publicly and privately owned, within the exterior boundaries of Kings Canyon National Park, saving to the State of California, however, those certain incidents of jurisdiction specifically reserved in the said statute of cession.

III.

That the State of California has the power, under the Constitution of the State of California and under the Constitution of the United States, to cede such jurisdiction to the United States of America.

IV.

That the United States Government has the power under the United States Constitution to accept such cession of jurisdiction from the State of California.

V.

That by the cession of such jurisdiction by the State of California and by acceptance of such jurisdiction by the United States of America, the United States Government derived exclusive police jurisdiction over all that territory, both publicly and privately owned, lying within the exterior boundaries of Kings Canyon National Park.

VI.

That as a part of its police jurisdiction, the United States Government through the Secretary of the Interior and the National Park Service, may promulgate rules and regulations for the maintenance of law and order within Kings Canyon National Park.

VII.

That the regulations governing the sale of liquor on privately-owned property within Kings Canyon National Park are a proper exercise of said police jurisdiction. [68]

VIII.

That Harry Theodore Petersen, Ida Petersen, Clayton Leon Daigle and Azile Carol Daigle as owners and operators of "The Lodge," are required

by Section 12.8 of Title 36, Code of Federal Regulations, to procure a permit for the sale of alcoholic, spirituous, vinous or fermented liquors from the National Park Service before offering the same for sale to the public.

IX.

That the State of California, having ceded exclusive police jurisdiction over all the territory lying within the exterior boundaries of Kings Canyon National Park, has no jurisdiction to require a liquor license from, or issue such license to, the defendants Petersen and Daigle as operators of "The Lodge."

X.

That the cession of exclusive police jurisdiction by the State of California, and the acceptance thereof by the United States of America, expressly saves the voting rights of persons residing in Kings Canyon National Park.

XI.

That the United States of America, the plaintiff herein, has an adequate criminal remedy for the violation of the regulations of the National Park Service which have the force of law.

XII.

That the extraordinary remedy of injunction is not warranted.

XIII.

That the plaintiff United States of America is

entitled to its costs and disbursements incurred or expended herein.

Let Judgment be entered accordingly.

Dated this 15th day of July, 1950.

WM. C. MATHES,

United States District Judge.

Affidavit of Service by Mail attached.

Lodged June 30, 1950.

[Endorsed]: Filed July 17, 1950. [69]

In the United States District Court in and for the
Southern District of California, Northern Division
No. 849-ND Civil

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HARRY THEODORE PETERSEN, et al.,

Defendants.

STATE OF CALIFORNIA,

Defendant in Intervention,

A. R. CUTLER, et al.,

Defendants in Intervention.

DECLARATORY JUDGMENT

This cause came on regularly for trial before the Court sitting without a jury on December 6, 1949,

Ernest A. Tolin, United States Attorney, Clyde C. Downing and Max F. Deutz, Assistant United States Attorneys, appearing as attorneys for the plaintiff; George, Winkler and Gibbs by Elmore W. Winkler appearing for the defendants Harry Theodore Petersen, et al., Fred N. Howser, Attorney General of the State of California by Bayard Rhone appearing for the defendant in intervention, the State of California, and Stammer and McKnight by W. H. Stammer appearing for the defendants in Intervention, A. R. Cutler, et al., and the parties having stipulated to all of the facts in this proceeding, and the Court having filed its Findings of Fact and Conclusions of Law, and being fully satisfied in the premises; [71]

It Is Hereby Ordered, Adjudged and Decreed that at all times since 12 m., Pacific War Time, on the first day of June, 1945, there has been vested in the United States of America exclusive jurisdiction over that privately-owned land, known as "Wilsonia Village," located in Section 5, Township 14 South Range 28 East, Mount Diablo Base and Meridian, and lying within the boundaries of Kings Canyon National Park, subject only to those incidents of jurisdiction expressly reserved by the State of California in the statute of cession, being section 119 of the Government Code of California [Cal. Stat. 1943, C. 96 § 2].

It Is Further Ordered, Adjudged and Decreed that the plaintiff United States of America have its costs and disbursements incurred or expended

herein as taxed by the Clerk in the sum of \$48.78.

Dated: July 15, 1950.

/s/ WM. C. MATHES,

United States District Judge.

Judgment entered July 18, 1950.

Affidavit of Service by Mail attached.

Lodged June 30, 1950.

[Endorsed]: Filed July 17, 1950. [72]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Harry Theodore Petersen, Ida Petersen, Clayton Leon Daigle, and Azile Carol Daigle, individually and as a co-partnership doing business as "The Lodge," defendants, and State of California, defendant and intervenor above-named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the declaratory judgment of the Honorable William C. Mathes, entered on July 18, 1950, in [74] Judgment Book No. 6, Page 297 in favor of the plaintiff and against the defendants and intervenors.

Dated: This 30th day of August, 1950.

FRED N. HOWSER,

Attorney General of the State of
California,

/s/ BAYARD RHONE,

Deputy Attorney General.

Attorneys for Intervenor and Defendant, State of
California.

GEORGE, WINKLER & GIBBS,

By /s/ ELMORE WINKLER,

Attorneys for Defendants
Petersen, et al.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 30, 1950. [75]

[Title of District Court and Cause.]

APPELLANTS' DESIGNATION OF RECORD ON APPEAL

To the Clerk of the Above-Entitled Court:

Appellants, the State of California, intervenor and defendant, and Harry Theodore Petersen, Ida Petersen, Clayton Leon Daigle, and Azile Carol Daigle, individually and as a co-partnership doing business as "The Lodge," defendants, through counsel, have appealed from the Judgment which was entered in [78] the above-entitled matter of July 18, 1950, and request hereby the preparation of the record on appeal.

The appellants hereby designate the papers and records on the file or lodged with you which they desire to have incorporated in the Record on Appeal, which consists of the complete record pursuant to Rule 75(d) of the Rules of Civil Procedure

for the United States District Court, which record and papers include and are hereby designated as follows:

1. Complaint for Injunction.
2. Answer of Harry Theodore Petersen, et al.
3. Stipulation Permitting the State of California to Intervene as Defendant; and Order Permitting the State of California to Intervene as Party Defendant.
4. Petition in Intervention and Answer of the State of California.
5. Stipulation of Facts and Purposes of Trial.
6. Minutes of the Court of December 6, 1949.
7. The Opinion of the District Court.
8. Findings of Fact and Conclusions of Law.
9. All Exhibits.
10. Declaratory Judgment.
11. Notice of Appeal.
12. Appellants' Designation of Record on Appeal.

Pursuant to the provisions of Rule 75(o) of the Rules of Civil Procedure for the United States District Court, and Rule 11 of the Rules of the United States Court of Appeal for the Ninth Circuit as Amended, request is hereby made that the Clerk of the above-entitled Court transmit all of the original papers and exhibits as designated by the appellants, and appellees in the files dealing

with the action or the proceedings [79] in which the appeal has been taken.

Dated: August 30, 1950.

FRED N. HOWSER,
Attorney General of the
State of California.

/s/ BAYARD RHONE,
Deputy Attorney General.

Attorneys for Intervenor and Defendant, State of
California.

GEORGE, WINKLER & GIBBS.

By /s/ ELMORE WINKLER,
Attorneys for Defendants
Petersen, et al.

Affidavits of Service by Mail attached.

[Endorsed]: Filed August 30, 1950. [80]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 82, inclusive, contain the original Complaint for Injunction; Answer; Stipulation and Order Permitting State of California to Intervene, etc.; Petition in Intervention and Answer of the State of California; Stipulation of Facts for

Purposes of Trial (Government's Exhibit No. 1 at the trial); Memorandum of Decision; Findings of Fact and Conclusions of Law; Declaratory Judgment; Notice of Appeal and Designation of Record on Appeal and a full, true and correct copy of Minute Order Entered December 6, 1949, which, together with Government's Exhibits 1-A, 1-B, 1-C, 1-D and 1-E (Exhibits A, B, C, D and E, respectively, to the Stipulation of Facts for Purposes of Trial) and Government's Exhibit No. 2, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.40 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 21st day of September, A.D. 1950.

EDMUND L. SMITH,
Clerk.

[Seal] By /s/ THEODORE HOCKE,
Chief Deputy. [81]

[Endorsed]: No. 12694. United States Court of Appeal for the Ninth Circuit. Harry Theodore Petersen, Ida Petersen, Clayton Leon Daigle and Azile Carol Daigle, Individually and as a Copartnership Doing Business as "The Lodge," and State of California, Appellants, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Northern Division.

Filed September 25, 1950.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the
Ninth Judicial Circuit

No. 12694

HARRY THEODORE PETERSEN, IDA PETERSEN, CLAYTON LEON DAIGLE and AZILE CAROL DAIGLE, Individually and as a Copartnership Doing Business as "The Lodge,"

Appellants,

STATE OF CALIFORNIA,

Intervenor and Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS UPON WHICH
APPELLANTS INTEND TO RELY

The appellants, Harry Theodore Petersen, et al., and the State of California intend to rely on appeal on the following points:

1. That the District Court erred in holding that the State of California has ceded to the United States of America exclusive jurisdiction over all territories, publicly and privately owned, within the exterior boundaries of King's Canyon National Park.

2. That the District Court erred in ruling that the State of California has ceded to the United States of America exclusive jurisdiction over that area known as Wilsonia Village, which is located in Section 5, Township 14.

3. That the District Court erred in holding that said tract of land comprising Wilsonia Village was "dedicated and set apart" for park purposes.

4. That the District Court erred in holding that the United States of America had accepted exclusive jurisdiction over all territory publicly and privately owned within the exterior boundaries of King's Canyon National Park.

5. That the District Court erred in holding that the State of California has power under the Constitution of the State of California and under the Constitution of the United States to cede exclusive jurisdiction to the United States of America of privately owned property in the State of California.

6. That the District Court erred in holding that the United States Government has power under the United States Constitution to accept cession of jurisdiction from the State of California of privately owned property in the State of California.

7. That the District Court erred in holding that the Secretary of the Interior and the National Park Service may promulgate rules and regulations relating to property not owned by the United States of America and not set aside and dedicated for park purposes.

8. That the District Court erred in holding that a liquor license, for premises in Wilsonia Village and which is located entirely on privately owned property, should be issued by the National Park Service and not by the State Board of Equalization of the State of California.

9. That the District Court erred in holding that regulations of the National Park Service purporting to govern the sale of liquor on privately owned property is a proper exercise of police jurisdiction of the United States.

10. That the District Court erred in holding that the appellants Petersen, et al., as owners and operators of "The Lodge" are required by Section 12.8 of Title 36, Code of Federal Regulations, to procure a license for the sale of alcoholic beverages from the National Park Service, before offering the same for sale in Wilsonia Village.

11. That the District Court erred in holding that the State of California had no jurisdiction to require a liquor license from, or to issue a liquor license to, the appellants Petersen, et al.

12. That the District Court erred in holding that the United States of America has any criminal remedy whatsoever for alleged violations of national park regulations on privately owned property.

13. That the District Court erred in holding that the United States courts have jurisdiction of offenses not committed within or on lands reserved or acquired for the exclusive use of the United States.

14. That the District Court adopted erroneous conclusions of law which are contrary to the laws of the State of California and the laws of the United States, and the judicial decisions of the state and federal courts.

15. That the District Court erred in holding that the United States took exclusive police jurisdiction away from the State of California by necessity allegedly "to secure the benefits intended to be derived" from the park.

Dated: September 28, 1950.

FRED N. HOWSER,
Attorney General.

/s/ BAYARD RHONE,
Deputy Attorney General, Attorneys for Appellant
State of California. [85]

GEORGE, WINKLER & GIBBS,
/s/ ELMORE WINKLER,
Attorneys for Appellants
Petersen, et al.

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 2, 1950. [86]

No. 12694.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HARRY THEODORE PETERSEN, IDA PETERSEN, CLAYTON
LEON DAIGLE, and AZILE CAROL DAIGLE, Individually
and as a Copartnership Doing Business as "The
Lodge," and STATE OF CALIFORNIA,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' OPENING BRIEF.

FRED N. HOWSER,

*Attorney General of the
State of California;*

BAYARD RHONE,

Deputy Attorney General,

600 State Building, Los Angeles 12,

Attorneys for the Appellant State of California.

GEORGE, WINKLER & GIBBS,

210 Brix Building, Fresno,

Attorneys for Appellants Petersen, et al.



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No. 12694.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HARRY THEODORE PETERSEN, IDA PETERSEN, CLAYTON
LEON DAIGLE, and AZILE CAROL DAIGLE, Individually
and as a Copartnership Doing Business as "The
Lodge," and STATE OF CALIFORNIA,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' OPENING BRIEF.

I.

Preliminary Jurisdictional Statement.

This action involves a dispute between the United States and the State of California as to which body politic had jurisdiction to issue a license to the appellants Petersen, *et al.*, to sell alcoholic beverages.

The United States filed a suit in a civil nature for injunction pursuant to 28 U. S. C. A. 1345 in the District Court, Southern District of California, Northern Division, on August 5, 1949, against all of the appellants except the State of California to restrain them from selling alcoholic beverage on real property which they owned

and occupied in Wilsonia Village. Wilsonia Village is a part of Section 5, Township 14 South, Range 28 East, Mount Diablo Meridian, California, and is located within the County of Tulare, and within the exterior boundary line of Kings Canyon National Park. It is the contention of the United States that it has exclusive police jurisdiction by virtue of the fact that Wilsonia Village is located within the exterior boundary line of the National Park. [Tr. pp. 2-10.] It was the contention of the United States that the sale of alcoholic beverages without a license from the National Park Service was in violation of the regulations of the Secretary of the Interior, appearing in Title 36, Code of Federal Regulations, Section 12.8. (12 Federal Register 6927; 13 Fed. Reg. 598-599.)

After an answer was filed by the appellants, other than the State of California, it was stipulated and ordered that the State of California be permitted to intervene as a defendant. [Tr. pp. 15-17.] In the answers of both of the appellants Petersen, *et al.*, and of the State of California, it is alleged that the tract of land known as Wilsonia Village, comprised of approximately 120 acres, had always been since the original patent in private ownership. It is further alleged that although this tract of land was within the line made by the exterior boundary of the park, that the State of California had not ceded any jurisdiction to the United States over such property, but on the contrary exclusive jurisdiction for all purposes had remained in the State of California since September 9, 1850. [Tr. pp. 12, 19-20.] The matter was submitted

for trial on a written stipulation of facts, oral argument, and written briefs. [Tr. pp. 44-45.] The Court wrote a Memorandum of Decision, wherein it indicated there was "an actual controversy" justiciable in the District Court between the United States and the defendants and cited 28 U. S. C., Sec. 2201. [Tr. p. 47.] The Court held that the criminal remedy at law was adequate, and, therefore, the injunction would be denied but that a declaratory judgment would be issued. [Tr. p. 53.] Pursuant thereto Findings of Fact and Conclusions of Law were drawn and a Declaratory Judgment was signed, wherein it was held that the United States had exclusive jurisdiction over the privately-owned land known as Wilsonia Village, lying within the exterior boundaries of Kings Canyon National Park. Judgment was entered July 18, 1950. [Tr. pp. 76-77.] The appellants herein filed Notice of Appeal from such judgment within the time allowed by law. [Tr. pp. 77-78; Rule 73(a)], together with designation of record [Tr. pp. 78-80], and statement of points upon which appellants intend to rely. [Tr. pp. 83-85.]

Jurisdiction of the Court of Appeal is invoked pursuant to 28 U. S. C. A., Sec. 1201.

II.

Statement of the Case.

This matter was submitted for decision on Stipulation of Facts, oral argument, and written briefs. The Findings of Fact set forth the pertinent facts which had previously been stipulated to and omit paragraphs XX and XXIX to which an objection was sustained. In this brief, reference to the facts will be confined to the Findings of Fact.

The appellants, except for the State of California, are a co-partnership which operates a cocktail lounge and restaurant known as "The Lodge" where alcoholic beverages are sold to the public. For simplicity in this brief, the group of appellants except the State of California will be referred to as "Appellants Petersen." "The Lodge" is located on Lots 11, 12 and 13 of Block 13 of Wilsonia Tract in Section 5, Township 14 South, Range 28 East, Mount Diablo Meridian, in the County of Tulare, State of California. Some of such appellants own other property in Wilsonia Tract. Wilsonia Tract, Mesa Addition to Wilsonia Tract, and Sierra Masonic Family Club Tract, are tracts located on approximately 120 acres of land within said Section 5, and are generally known as "Wilsonia Village." There are 243 owners of homes located upon the privately-owned land in Wilsonia Village. Other defendants who were permitted to intervene in this proceeding, and who have not appealed herein, represent approximately 63 of said home owners in said

village. The lands are a part of a tract of 160 acres of said Section 5 which was originally patented by the United States Government on October 15, 1891, to one Daniel M. Perry. The area in Wilsonia Village has remained in private ownership since the issuance of said patent, and has been divided into approximately 500 parcels. [Tr. pp. 55-56.]

On November 26, 1947, the appellants Petersen applied to the Department of Interior, Park Service, Regional Office, San Francisco, for a permit to sell alcoholic beverages at "The Lodge." The application was denied on March 3, 1948. The appellants Petersen subsequently requested a reconsideration and an oral hearing, but thereafter withdrew the request. No appeal was taken to the order of denial by the appellants Petersen. The appellants Petersen, as operators of The Lodge, did not, and do not, hold any license as provided by the regulations of the Secretary of the Interior, Title 36, Code of Federal Regulations, Section 12.8, the pertinent text of which appears in the Transcript, pages 62 to 63. [Tr. p. 64.] On April 14, 1948, the appellants Petersen applied to the State Board of Equalization of the State of California for a seasonal on-sale beer and wine and distilled spirits license pursuant to the provisions of the Alcoholic Beverage Control Act of the State of California. A protest was filed on behalf of the National Park Service, Department of Interior, objecting to the issuance of the licenses on the ground that the United States claims exclusive jurisdiction over private lands in Kings Canyon National

Park. Said matter was duly and regularly heard by a Hearing Officer of said Board of Equalization on May 10, 1948, pursuant to the provisions of Subdivision (c) of Section 11517 of the Government Code; and on June 4, 1948, the matter was heard by the Board. The matter came on for hearing again before the Board on July 22, 1948, pursuant to notice given to all parties including the Regional Council for the National Park Service. After consideration thereof, the Board of Equalization issued seasonal licenses. These licenses have been in effect ever since July 22, 1948, on a seasonal basis. [Tr. p. 65.]

Five days later, July 27, 1948, the Regional Director, National Park Service, San Francisco, notified the appellants Petersen by letter that the National Park Service did not recognize the jurisdiction of the State Board of Equalization either to grant or deny the liquor license; and that any sale of liquor at the Lodge without a permit from the Park Service would subject the appellants Petersen to prosecution.

Wilsomia Village is within the Sierra Union School District of the County of Tulare, which maintains a school at Badger in said District. Up until about 1945, a public school was operated by the State School District at General Grant Grove. Said school was located on government-owned land and attended by children from families residing on both government- and privately-owned land. Said school was discontinued when it fell below the required minimum enrollment. [Tr. p. 68.] Some de-

fendants and government employees residing within Kings Canyon National Park vote at general county and state elections at the school at Badger, Tulare County. [Tr. p. 69.]

The National Park Service has fire fighting equipment, consisting of two pump trucks, located at General Grant Grove, approximately one-half mile from Wilsonia Village. Wilsonia Fire District is a district organized under the laws of the State of California which includes only the privately-owned areas in Wilsonia Village and is solely for the purpose of furnishing fire protection to said privately-owned areas. Annual assessments are levied upon the privately-owned lands in said Fire District for said purpose. By agreement with the County of Tulare, said Fire District and the California State Department of Forestry maintain a fire engine at Wilsonia. [Tr. p. 67.]

The Findings quote certain portions of the Federal and State statutes, particularly, 16 U. S. C. A. 57 (41 Stats. 731), 16 U. S. C. A. 80a (54 Stats. 41), California Statutes 1919, Chapter 51, and Section 119 of the Government Code of California [Tr. pp. 57-60], but these statutes will be specifically referred to and portions thereof set forth hereinafter under the heading "Statutory History of Section 5, Township 14."

III.

Specifications of Error.

1. The District Court erred in holding that the State of California has ceded to the United States of America and that the United States of America has accepted from the State of California the exclusive jurisdiction over that area of privately-owned property known as Wilsonia Village.

2. The District Court has erred in holding in effect that that tract of privately-owned land comprising Wilsonia Village was “dedicated and set apart” for park purposes.

3. The District Court erred in holding that the United States Court has jurisdiction of offenses committed within or on lands not reserved or not acquired for the exclusive use of the United States.

4. The District Court erred in holding that the State of California has no jurisdiction to require a liquor license from, or to issue a liquor license to, the appellants Petersen.

5. The District Court erred in holding that a liquor license for premises on privately-owned property in Wilsonia Village should be issued by the National Park Service under regulations of the Secretary of the Interior, and not by the State Board of Equalization of the State of California.

6. The District Court erred in holding that the United States took exclusive police jurisdiction away from the State of California to secure the benefits intended to be derived from the National Park.

IV.

Statutory History of Section 5, Township 14.

A. Federal Statutes.

The first reference to the land in question is found in Section 3 of 26 Stats. 651 (16 U. S. C. A. 471(c)), which was enacted October 1, 1891, and provided that certain forest land in California was reserved and withdrawn from settlement, occupancy or sale and set apart as reserved forest land. Section 1 of the act provided that nothing in the act should be construed as in any wise affecting any *bona fide* entry of land under any law of the United States prior to October 1, 1890.

The next reference from a historical standpoint which can be found relating to Section 5, Township 14, is 31 Stats. 618 (16 U. S. C. A. 78) and which was adopted June 6, 1900. The original act provided that the Secretary of War, upon request from the Secretary of the Interior, was authorized and directed to make the necessary detail of troops to prevent trespassers or intruders from entering the Sequoia National Park, Yosemite National Park and General Grant National Park, respectively, for the purpose of destroying the game or objects of curiosity therein, or for any other purpose prohibited by law or regulation. This particular section was amended March 4, 1940, by 54 Stats. 43, and the effect of the amendment in so far as we are now concerned is to delete the words "the General Grant National Park."

The next reference to General Grant National Park is found in 31 Stats. 790 (Feb. 15, 1901; 16 U. S. C. A. 79), which provided that the Secretary of the Interior was authorized and empowered under general regulations

fixed by him to permit the use of rights of way to Yosemite, Sequoia and General Grant National Parks for electrical plants, poles and lines, and other easements for pipe lines, water, etc. This particular statute was likewise amended March 4, 1940 (54 Stats. 43) and the reference to General Grant National Park was deleted therefrom.

By 41 Stats. 731, adopted June 20, 1920 (16 U. S. C. A. 57) it was provided that full and exclusive jurisdiction was assumed by the United States over the territory embraced and included within Yosemite National Park, Sequoia National Park, General Grant National Park, respectively, saving certain revisions to the State of California. This statute likewise was amended by 54 Stats. 43 on March 4, 1940, so that the reference to General Grant National Park was deleted.

Section 1 of 54 Stats. 41, adopted March 4, 1940 (16 U. S. C. A. 80), established Kings Canyon National Park, and set out its boundaries and provided for the preservation of rights of citizens. The greater portion of the statute is detailed description of the property embraced within the park; but the description does not include Section 5, Township 14. The statute provides that the property described (Kings Canyon) is hereby "reserved and withdrawn from settlement, occupancy, or disposal under the laws of the United States and *dedicated and set apart as a public park*, to be known as Kings Canyon National Park, for the benefit and enjoyment of the people; *Provided*, that nothing in sections 80-80(d) of this title shall be construed to affect or abridge any right acquired by any citizen of the United States in the above described area:" and for the protection of certain rights relating to grazing.

Section 2 of the statute (16 U. S. C. A. 80(a)), relates to Section 5, Township 14. This provides that General Grant Park is hereby abolished and that certain described property, together with the lands formerly within the General Grant National Park, and particularly described as follows, to wit, "all of sections 31 and 32, township 13 south, range 28 east, and sections 5 and 6, township 14 south, range 28 east, of the same meridian, are, subject to valid existing rights, hereby added to and made a part of Kings Canyon National Park and such land shall be known as the General Grant Grove section of said park." The section further provides that General Grant Grove may by proclamation be extended to include certain other properties.

B. State Statutes.

The history of the California statutes regarding cession generally, and also of General Grant National Park specifically, will be set out briefly.

Section 34 of the Political Code was enacted at the time of the adoption of the code in 1872 and provided that the legislature consents to the purchase or condemnation by the United States of any tract of land for the purpose of erecting forts, magazines, arsenals, dockyards and other needful buildings, upon the express condition that all civil process issued from the courts of this state, and such criminal process as may issue under the authority of the state may be served and executed thereon, and so forth. Section 35 of the Political Code was added, but apparently this merely codified Stats. 1873-1874, page 621, and provided for the conveyance of state lands for lighthouse sites.

In 1891 the legislature passed Statutes of 1891, page 262 (chapter 181), which reads in part, as follows:

“Section 1. The State of California hereby cedes to the United States of America exclusive jurisdiction over such piece or parcel of land as may have been or may be hereafter ceded or conveyed to the United States, *during the time the United States shall be or remain the owner thereof*, for all purposes except the administration of the criminal laws of this state and the service of civil process therein.” (Emphasis added.)

The first statute specifically naming General Grant National Park is Stats. 1919 (Chapter 51, page 74), and provides among other things that exclusive jurisdiction shall be and the same is hereby ceded to the United States over and within all of the territory which is now or may hereafter be included in those several tracts of land *set aside and dedicated for park purposes by the United States* as Yosemite National Park, Sequoia National Park and General Grant National Park, save the right to serve civil and criminal process, and so forth.

The next enactment by the state is to be found in Government Code Section 119 (added by Stats. 1943, Chapter 96) and Section 120 (added by Stats. 1943, Chapter 536). These two sections read as follows:

“119. Cession of exclusive jurisdiction to United States: Lands in Kings Canyon National Park: Reservations: When jurisdiction vests. Exclusive jurisdiction shall be and the same is hereby ceded to the United States over and within all of the territory which is now or may hereafter be included in those

several tracts of land in the State of California set aside and dedicated for park purposes by the United States as 'Kings Canyon National Park'; saving however to the State of California the right to serve civil or criminal process within the limits of the aforesaid park in suits or prosecutions for or on account of rights acquired, obligations incurred, or crimes committed in said State outside of said park; and saving further to the said State the right to tax persons and corporations, their franchises and property on the lands included in said park; and the right to fix and collect license fees for fishing in said park; and saving also to the persons residing in said park now or hereafter the right to vote at all elections held within the county or counties in which said park is situate. The jurisdiction granted by this section shall not vest until the United States through the proper officer notifies the State of California that it assumes police jurisdiction over said park. (Added by Stats. 1943, ch. 96, section 2.)

"Section 120. Notification of acceptance by United States of exclusive jurisdiction: Filing copies. Upon receipt of notification of the acceptance by the United States of exclusive jurisdiction over lands situated within the State of California, the Governor shall cause to be filed a true and correct copy of said notification in the office of the recorder of the county in which said lands are located and in the office of the clerk of the board of supervisors of the county in which said lands are located. (Added by Stats. 1943, ch. 536, section 2.)"

ARGUMENT.

A.

The Tract of Land Comprising Wilsonia Village Was Not “Dedicated and Set Apart” for Park Purposes.

Neither the written Stipulation of Facts nor the Findings of Fact make any mention that the privately-owned property in Wilsonia Village was or was not “set aside and dedicated for park purposes.” The Stipulation of Fact and the Findings of Fact show that the property in question has been in private ownership at all times subsequent to the original patent. The trial court did not make a finding that the private property was “set aside and dedicated for park purposes,” but the appellants believe that the effect of the decision of the trial court is that the privately-owned property was “set aside and dedicated for park purposes.” The Memorandum Opinion of the trial judge states:

“ . . . Admittedly the lands owned by defendants and the individual intervenors are not ‘set aside and dedicated for ‘park purposes’ [See 54 Stats. 41, 43 (1940), 16 U. S. C., §§80, 80a]; but it is equally beyond question that ‘Wilsonia Village’ is, in the language of the California Legislature, ‘included in those several tracts of land in the State of California set aside and dedicated for park purposes by the United States as “Kings Canyon National Park”.’ ”

However, the Court did make a finding [See Paragraph XXXIV, Tr. p. 71] that exclusive police jurisdiction by the United States was at the time of said cession and now is necessary in order to secure the benefits intended to be derived from the publicly-owned land dedicated and set apart for park purposes. There were no facts of any kind

in the written Stipulation of Facts to form any basis whatsoever for such finding. It is the appellants' contention that by this finding and by the ultimate determination of the trial court, it determined in effect that the privately-owned property comprising Wilsonia Village had been "dedicated and set apart for park purposes." This determination is contrary to the fact, and is contrary to the law.

We have heretofore pointed out the various statutes of the United States dedicating and setting apart General Grant National Park. It will be recalled that the statute of 1890 merely withdrew the lands from entry but did not affect any entry previously made. This act did not establish a national park, but rather designated the land as reserved forest land. It may safely be assumed that the area was designated a national park by an executive or administrative order. At any rate, the next act of Congress (1900) which has come to our attention assumes that General Grant National Park is an accomplished fact. The act of the State Legislature in 1919 ceded exclusive jurisdiction with certain exceptions over the territory which is now or may hereafter be included in those several tracts of land *set aside and dedicated for park purposes by the United States*. This act of cession was accepted by the United States by 41 Stats. 731 (16 U. S. C. A. 57). The statutes have been amended as has been pointed out, particularly by the adoption on March 4, 1940 of 54 Stats. 43 (16 U. S. C. A. 80(a)) and Government Code Sections 119 and 120 by the State Legislature in 1943. Section 119 of the Government Code carries the same words as the previous state statute and it relates to all the territory which is now or may hereafter be included in those several tracts of land set aside and dedicated for park

purposes by the United States. It has been pointed out that 16 U. S. C. A. 80 establishing Kings Canyon National Park describes by metes and bounds the vast area of property, and then provides that such property is reserved and withdrawn from settlement, occupancy, or disposal under the laws of the United States and “dedicated and set apart as a public park.” The next section then provides for the abolishment of General Grant National Park but provides that such park shall be included in Kings Canyon National Park and be known as General Grant Grove section of such park. There is no actual dedication of any of the property mentioned in Section 80(a). The property is mentioned as follows:

“ . . . All of sections 31 and 32, township 13 south, range 28 east, and sections 5 and 6, township 14 south, range 28 east, of the same meridian . . . ”

By the express terms of that act, the Government land within the area described (*i. e.*, Kings Canyon) was “reserved and withdrawn from settlement, occupancy, or disposal under the laws of the United States” and was “dedicated and set apart as a public park for the benefit and enjoyment of the people.” The Statute, however, provides specifically “that nothing in this act shall be construed to effect or abridge any right acquired by any citizen of the United States in the above-described area.” By this same Act, General Grant National Park was abolished and its area “subject to valid existing rights” was added to and made a part of Kings Canyon National Park as General Grant Grove section. The private land affected by this action is within that area. Therefore, all private land was excepted from the dedication to public use by the United States. First, because private land could not be dedicated to the benefit and enjoyment of the peo-

ple without just compensation, under the Constitution of the United States; second, the Statute, by its very terms, affected only lands reserved and withdrawn from settlement, occupancy, or disposal under the laws of the United States . . . in other words, government land; third, because the Statute expressly provided that it should not be construed to affect or abridge any private right acquired by anyone in the area; and, fourth, because the addition of the General Grant Grove section to the park was expressly made subject to valid existing rights.

After this dedication of Kings Canyon and the rededication of the Grant grove section to the park thereof, the California Legislature on April 7, 1943 (Gov. Code, Sec. 119) ceded to the United States exclusive jurisdiction over "those several tracts of land in the State of California *set aside and dedicated for park purposes*" by the United States as Kings Canyon National Park (emphasis added). California, therefore, ceded exclusive jurisdiction only over lands owned by the United States and "set aside and dedicated" for park purposes.

On the other hand, the United States accepted exclusive jurisdiction of the lands dedicated as Kings Canyon National Park by a letter of the Secretary of the Interior dated April 21, 1945 [for the full text of the letter, see Tr. p. 61]. The Secretary stated in the letter, among other things, that he was giving notice pursuant to the Act of October 9, 1940, "that the United States accepts exclusive jurisdiction over all land now included in Kings Canyon National Park" exclusive jurisdiction of which "was ceded to the United States by the act of the Legislature approved April 7, 1943"

This acceptance did not operate to confer jurisdiction over the private lands of the individual defendants or other

owners of private lands in Wilsonia Village. First, Government Code, Section 119 did not cede such jurisdiction, and acceptance was restricted, by terms, to the cession of jurisdiction by the State. Second, the Secretary of the Interior only had power to accept jurisdiction over government-owned land, because the act of October 9, 1940 (54 Stat. 1083, 40 U. S. C. A. 255) only permitted the Secretary to accept exclusive jurisdiction "over lands or interest therein which have been or shall hereafter be acquired by it" (*i. e.*, the United States), from a State "in which are situated lands which are under his immediate jurisdiction, custody, or control."

That Act concludes "unless and until the United States has accepted jurisdiction over lands hereafter to be acquired as aforesaid, it shall be conclusively presumed that no such jurisdiction has been accepted." By this language, the policy of restricting the Secretary's acceptance of jurisdiction to land *acquired* by the United States was fixed beyond question. The Secretary of the Interior, therefore, only had power to accept for the United States exclusive jurisdiction over lands or interest which had been acquired by the United States and over which he had immediate jurisdiction, custody, or control; and by his letter of acceptance he could not have secured for the United States exclusive jurisdiction over privately owned property situated in Wilsonia Village.

The only persons or bodies that may make a lawful dedication of any property for any use is the owner thereof. The United States is not and does not contend that it is the owner of any of the property in Wilsonia Village (other than several lots, insignificant to this proceeding). The term "dedication" is defined as the intentional appropriation of land *by the owner* for proper public use.

(16 Am. Jur. 348.) It is elementary that it is essential to a valid dedication that it be made by the legal or equitable owner of the fee, or at least, with his consent. (16 Am. Jur. 352, section 9, and particularly cases cited therein.) Particular reference is made to *United States v. City of Chicago*, 48 U. S. 185, where it was contended by the City of Chicago that streets which had been laid out by the United States Government at Fort Dearborn had been dedicated to public use, but wherein the Supreme Court held that such property had been acquired by the United States as part of the Northwest Territory as a military fort and therefore it was not subject to some of the other conditions relative to public lands and any act of an agent of the government was not binding on the United States.

The fact that a State does not and cannot cede jurisdiction of private lands within its borders is recognized in many authorities which will be hereinafter pointed out in this brief. Among others, not discussed later, is *In re O'Conner*, 37 Wis. 379, 19 Am. Rep. 765, where the Court held that an attempted cession of jurisdiction by the State over a Federal home for soldiers was void because the United States did not own the land in question. In *United States v. Schwalby* (Texas), 29 S. W. 90, 92, the Court held that a State could not cede jurisdiction to real property unless the United States was the owner, and that it was not intended by either the State nor the Federal Government that a State should cede jurisdiction over private lands within its borders. Other similar cases, such as *Rodman v. Pothier*, 264 U. S. 399, 44 Sup. Ct. 360, 68 L. Ed. 759; *Pothier v. Rodman*, 291 Fed. 311, and *Adams v. United States*, 319 U. S. 312, 63 Sup. Ct. 1122, 87 L. Ed. 1421, will be pointed out in more detail

hereinafter. It is respectfully submitted that the property in Wilsonia Village has never been dedicated and set apart for park purposes. The various acts of cession of the State of California relate only to the property which has been dedicated and set apart for park purposes.

B.

The United States Courts Do Not Have Jurisdiction of Offenses Unless Committed Within or on "Lands Reserved or Acquired for the Use of the United States."

The District Court concluded that the extraordinary remedy of injunction was not warranted in this case. It held that there was adequate criminal remedy for a violation of the regulations of the National Park Service. [Tr. p. 74.] In determining that the United States had jurisdiction either by criminal remedy or otherwise the Court failed to take into consideration the basic jurisdictional statute.

For years the United States Criminal Code has provided that the Federal Courts have jurisdiction over crimes and offenses when committed within or on any lands reserved or acquired for the exclusive use of the United States. This was so provided in section 272 of the Criminal Code, and was found in Title 18, United States Code, section 451 before the change in the Code approved June 25, 1948. The section is now found in Title 18, United States Code, section 7, and provides that the term "special maritime and territorial jurisdiction of the United States" as used in this title includes:

"3. Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or

otherwise acquired by the United States by consent of the legislature of the state in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful buildings.”

One of the cases most directly in point in support of the position of the appellants is the case of *Pothier v. Rodman, U. S. Marshal*, 291 Fed. 311 (First Circuit, 1923). That was an appeal from an order denying a petition for writ of habeas corpus. Pothier was indicted in the District Court in the State of Washington for a murder committed on October 25, 1918 on Camp Lewis Military Reservation. Pothier was arrested and apprehended in the State of Rhode Island and objected to his removal to the Federal Court in the State of Washington. The facts show that the State of Washington had authorized Pierce County, Washington, to acquire approximately 70,000 acres of land and convey it to the United States under certain conditions. One of the conditions was that upon such conveyance being concluded a sufficient description and an accurate map or plat of each tract or parcel of land be filed in the Auditor's office in Pierce County, together with copies of the orders, deeds, patents or other evidences in writing of the title of the United States. The deed was not executed and acknowledged until October 1, 1919, when it was signed and acknowledged by the board of county commissioners and accepted on behalf of the United States by the Secretary of War, and it was not recorded until November 15, 1919. However, the District Court in passing upon the question apparently entertained the view that inasmuch as the evidence showed that before the delivery of the deed and its acceptance, the United States Military Authorities had entered upon some of the land acquired by the county and erected buildings

and occupied the same with 50,000 men, the state thereby yielded up its sovereignty and the United States acquired exclusive jurisdiction over the land thus occupied, and that this being so, the *prima facie* case of probable cause made by the indictment was not overcome. However, the Circuit Court of Appeals held that at the time the crime charged in the indictment was committed the United States had acquired no title to the land embraced within Camp Lewis and that the sovereignty of the state over the land had not then been yielded up and was not yielded until the deed, maps, and so forth were filed in the office of the County Auditor of Pierce County for record, which was not until November 15, 1919, more than a year after the alleged murder.

On further appeal (*Rodman v. Pothier*, 264 U. S. 399, 44 S. Ct. 360, 68 L. Ed. 759), the Supreme Court reversed the Circuit Court of Appeals, but did not determine the question of exclusive jurisdiction but held that that was a matter to be determined by the trial court where the indictment was found. The Supreme Court stated that whether the locus of the alleged crime was within the exclusive jurisdiction of the United States demands consideration of many facts and seriously controverted questions of law, which must be determined by the court where the indictment was found. The regular course may not be anticipated by alleging want of jurisdiction and demanding a ruling thereon in a *habeas corpus* proceeding. Barring certain exceptional cases (unlike the present one) the Supreme Court has uniformly held that the hearing on *habeas corpus* is not in the nature of a writ of error, nor is it intended as a substitute for the functions of the trial court. Manifestly, this is true as to disputed questions of fact, and it is equally so as to disputed matters of law, whether they relate to the sufficiency of the indict-

ment or the validity of the statute on which the charge is based. These and all other controverted matters of law and fact are for the determination of the trial court.

In a more recent case, the Supreme Court of Montana, in *Valley County v. Thomas*, 109 Mont. 345, 97 P. 2d 345, followed the decision of *Rodman v. Pothier (supra)*, 264 U. S. 399, 44 S. Ct. 360, 68 L. Ed. 759, and similar cases. The court pointed out that it is well settled that the state statutes relinquishing public power or jurisdiction are to be strictly construed, and that every presumption is insistent on the side of the state sovereignty compelling a dissolution of every doubt in its favor. See particularly the discussion of the Court on pages 358 and 359 of Pacific Reporter.

In *Adams v. United States*, 319 U. S. 312, 63 S. Ct. 1122, 87 L. Ed. 1421, the question of the jurisdiction of the Federal Courts was certified to the Supreme Court by the Circuit Court of Appeals. The ultimate question to be determined was whether Camp Claiborne, Louisiana, was within the federal criminal jurisdiction. In this particular case the government had acquired title to the land at the time of the crime, but it had not given notice as required by the Act of October 9, 1940 (40 U. S. C. A., Sec. 255). The Supreme Court in discussing the act of Congress and its effect, stated as follows:

“The legislation followed our decisions in *James v. Dravo Contracting Co.*, 302 U. S. 134, 58 S. Ct. 208, 82 L. Ed. 155, 114 A. L. R. 318; *Mason Co. v. Tax Commission*, 302 U. S. 186, 58 S. Ct. 233, 82 L. Ed. 187; and *Collins v. Yosemite Park Co.*, 304 U. S. 518, 58 S. Ct. 1009, 82 L. Ed. 1502. These cases arose from controversies concerning the relation of federal and state powers over government

property and had pointed the way to practical adjustments. The bill resulted from a co-operative study by government officials, and was aimed at giving broad discretion to the various agencies in order that they might obtain only the necessary jurisdiction. The Act created a definite method of acceptance of jurisdiction so that all persons could know whether the government had obtained 'no jurisdiction at all, or partial jurisdiction, or exclusive jurisdiction.'

"Both the Judge Advocate General of the Army and the Solicitor of the Department of Agriculture have construed the 1940 Act as requiring that notice of acceptance be filed if the government is to obtain concurrent jurisdiction. The Department of Justice has abandoned the view of jurisdiction which prompted the institution of this proceeding, and now advised us of its view that concurrent jurisdiction can be acquired only by the formal acceptance prescribed in the act. These agencies co-operated in developing the act, and their views are entitled to great weight in its interpretation. *Cr. Bowen v. Johnson*, 306 U. S. 19, 20, 30, 59 S. Ct. 442, 83 L. Ed. 455. Besides, we can think of no other rational meaning for the phrase 'jurisdiction, exclusive or partial' than that which the administrative construction gives it.

"Since the government had not accepted jurisdiction in the manner required by the Act, the federal court had no jurisdiction of this proceeding. In this view it is immaterial that Louisiana statutes authorized the government to take jurisdiction, since at the critical time the jurisdiction had not been taken.

"Our answer to certified question No. 1 is Yes and to question No. 2 is No."

In *United States v. Tully*, 140 Fed. 899, it was held that the United States did not have jurisdiction over land actually used for a military reservation if it was not the owner of such land. In this particular case, the headquarters of Fort Missoula Military Reservation was located upon the particular land in question, although the land was not owned by the United States but by the state. The Constitution of Montana specifically provided that the United States had exclusive jurisdiction over certain military reservations, including Fort Missoula. However, the Federal Court held in line with all of the authorities both before and after, as cited herein, that the United States did not have jurisdiction over that portion of Fort Missoula Military Reservation.

In a New York case (*People v. Bondman*, 291 N. Y. 213), the defendant was charged with the crime of manslaughter committed on lands occupied by the United States under lease and used as a camp for civilian conservation corps. The defendant moved to dismiss the indictment on the ground that the United States had acquired exclusive jurisdiction over the lands under a consent statute of the State of New York, and that the federal courts had jurisdiction over the offense under Section 371 of Title 28, United States Code—manslaughter being one of the crimes enumerated in that section and defined under Section 453 of Title 18. In denying the motion, the Court held that the use of the property under lease was not a purchase of property or an acquisition of property under the provisions of the Federal Constitution.

A few cases involving the leasing or temporary use of land will now be pointed out. In an early federal case which involved the lease of land by the United States for one month, with the privilege of using it for six months, the Court in *United States v. Tierney*, 28 Fed. Cas. No. 16517, said:

“ . . . The constitution clearly implies the permanent use of the property purchased for the construction or erection of some of the structures designated, or some other needful building. It would be strange, indeed, if such an agreement for renting a piece of land to the United States should deprive the State of Ohio of all jurisdiction over it, and confer sole and exclusive jurisdiction to the United States.”

The same rule has been followed in more recent decisions of the state courts. In an Alabama case (*Brooke v. State*, 155 Ala. 78, 46 So. 491), the Supreme Court of that state held that the state courts had jurisdiction to try the defendant charged with the commission of a crime within a post office situated on land which the United States occupied under lease, notwithstanding the existence, at the time the lease was entered into, of an Alabama statute authorizing the United States to “acquire and hold lands” for the construction of needful government buildings. In a Maryland case (*Mayor and City Council of Baltimore v. Linthicum*, 183 Atl. 531, 533), it was held that the zoning laws of the City of Baltimore

were applicable to property leased by the United States for the purpose of a post office. The Court held:

“ . . . it may be observed that the property is not owned by the United States; there is only a lease limited to ten years' duration, or the duration of appropriations for rentals, and the lessee has only such property rights as may be derived from the owner. . . . The property is not, therefore, within the exclusive jurisdiction of the United States under the United States Constitution, article I, sec. 8.”

On the question of whether or not enforcement of the ordinance would constitute an interference with federal function, the Court said:

“ . . . Any interference of the local police regulations with the mails would be, at most, an indirect one, and to pass on the objection on that ground we should have to consider the rule and the decisions on local regulations interfering only incidentally with federal powers.”

It is submitted that under the basic law vesting jurisdiction in the United States Courts, that the District Court would not have jurisdiction for any alleged offense for selling alcoholic beverages at “The Lodge.” This fundamental proposition should entirely dispose of the appeal herein. The limitation of jurisdiction expressed in Subdivision 3 of Section 7 of Title 18 is in accordance with the established legal philosophy on the relation between the States and the National Government.

C.

The United States Does Not Acquire Exclusive Jurisdiction Unless It Owns the Property Involved.

It is the State's contention that the legal philosophy of the relationship between the States and the National Government ever since the founding of the Union has been that the United States does not and can not have exclusive jurisdiction of any parcel of land (other than the District of Columbia) unless it is the owner of the parcel of land involved. We believe this philosophy is so ingrained that there has been little occasion for any decision directly on the point. There are innumerable decisions which appear to accept this legal philosophy as a premise, without question. Furthermore, it will be pointed out later herein that Congress has likewise accepted this philosophy without question.

Section 8, cause 17 of the United States Constitution provides that Congress is authorized to exercise exclusive legislation in all cases whatsoever over the District of Columbia "and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings;"

In the proceedings before the constitutional convention on September 5, 1787, it was contended by Mr. Gerry that the power of this latter clause might be made use of to enslave any particular state by buying up its territory and that the strongholds proposed would be a means of awing the state into an undue obedience to the general government. Mr. King himself thought the provision unnecessary, the power being already involved, but would move to

insert after the word "purchase" the words "by consent of the legislature of the state" and that this would certainly make the power safe. The clause was accordingly amended, and it will be observed that the clause now reads in accordance with the amendment made on September 5, 1787. (Max Ferrand, "The Records of the Federal Convention," Vol. 2, pp. 508, 510.)

It was first thought that the only way the United States could acquire exclusive jurisdiction under this clause was by the purchase of the property, the term "purchase" being defined in the popular sense of purchase as distinguished from the definition of "purchase" as peculiar to real property with respect to descent and distribution. It is now well settled that when lands are acquired or held by the United States within a state, whether acquired by purchase or by the exercise of its power of eminent domain, or where public lands of the United States have been set aside or reserved to the Federal Government for such particular purpose, the state may cede to the Federal Government jurisdiction over such lands to the same extent that the government might have acquired exclusive jurisdiction had the lands been purchased with the consent of the state for the purpose authorized in clause 17.

Fort Leavenworth Railroad Co. v. Lowe, 114 U. S. 525, 29 L. Ed. 264, 5 S. Ct. 995.

See also:

54 Am. Jur. 597, 599.

It is not contended that General Grant National Park or any of the other national parks were acquired under this provision of the constitution. Furthermore, it is no longer open to question that the United States can acquire

exclusive jurisdiction, with the consent of the state, over land for some purpose other than under clause 17.

Collins v. Yosemite Park & Curry Co. (supra), 304 U. S. 518, 58 S. Ct. 1009, 82 L. Ed. 1502.

The attention of the Court has already been directed to the cases of *Rodman v. Pothier, supra*, 264 U. S. 399, 44 Sup. Ct. 360, 68 L. Ed. 759; *Adams v. United States, supra*, 319 U. S. 312, 63 Sup. Ct. 1122, 87 L. Ed. 1421, and *People v. Bondman, supra*, 291 N. Y. 213.

In *James v. Dravo Contracting Co.*, 302 U. S. 134, 58 S. Ct. 208, 82 L. Ed. 155, the question involved was whether the Dravo Contracting Co., a Pennsylvania corporation, was liable for a tax on the gross receipts on contracts to the State of West Virginia on a group of contracts with the United States for the construction of locks and dams in the Kenawha River and Ohio River. Much of the material was prefabricated in the contractors' shops in Pittsburgh, Pennsylvania. The court held that the State of West Virginia could not tax any of the work performed in Pennsylvania. It was contended that the tax was invalid for the reason that it laid a direct burden upon the Federal Government, but the court by a divided court rejected this contention. As to the property leased by the contracting company in the State of West Virginia by the site, the court stated there could be no question as to the jurisdiction of the state over that area. We are concerned with the remaining portion of the opinion, which has to do with the title of the property where the locks and dams were actually constructed, that is, on the beds of the rivers. The court held that the title to the beds of the rivers was in the state, and that although the Federal Government may have paramount authority for the con-

struction of the dams and locks, nevertheless the title was in the state. There is considerable discussion in the case with reference to exclusive and concurrent jurisdiction and the power of the state to refuse to yield jurisdiction and the right of the Federal Government to decline to accept jurisdiction. The court points out that the transfer of legislative jurisdiction carries with it not only benefits but obligations, and it may be highly desirable in the interests of both the national government and the state that the latter should not be entirely ousted from its jurisdiction. The possible importance of reserving to the state jurisdiction for local purposes which involve no interference with the governmental functions is becoming more and more clear as the activities of the government expand, and large areas within the states are acquired. The court concluded that as far as the territorial jurisdiction is concerned, the state had authority to lay the tax with respect to the activities of the contracting company carried on at the respective dam sites.

The Supreme Court of the State of Oregon reached a similar conclusion a few months earlier in a similar case, in *Atkinson v. State Tax Commission*, 156 Ore. 461, 67 P. 2d 161. This case involved a contractor who had a contract involving the construction of Bonneville Dam Project on the Columbia River. There is a slightly earlier case to the same effect by the Supreme Court of the State of Washington of *Ryan v. State*, 188 Wash. 115, 61 P. 2d 1276, involving work performed on Grand Coulee Dam. The latter case was appealed to the Supreme Court of the United States and decided on the same day as *James v. Dravo Contracting Co.* (*supra*), 302 U. S. 134, 58 S. Ct. 208, together with the case of *Silas Mason Co., Inc. v. State Tax Commission of the State of Washington*, 302 U.

S. 186, 58 S. Ct. 233, 82 L. Ed. 187. The Supreme Court concluded that the state had territorial jurisdiction to impose the tax.

In *Johnson v. Morrill*, 20 Cal. 2d 446, 126 P. 2d 873, a question arose as to the right of the various petitioners to register as electors in the County of Solano. The United States was not a party to that proceeding. The petitioners were all employed in national defense activities at Mare Island Navy Yard near the City of Vallejo, Solano County, and resided in various defense housing projects constructed outside the confines of the navy yard. The question presented was whether the United States had acquired exclusive jurisdiction of the areas occupied by these defense housing projects on which the petitioners resided, so as to prevent the exercise by the petitioners of the right of suffrage in said County and in the State of California. None of the projects involved had been expressly accepted for exclusive jurisdiction by the United States by the filing of any notice of acceptance of exclusive jurisdiction. The petitioner Cohen resided on property which was leased by the Federal Government from Carquinez Development Company. It was pointed out by the Supreme Court that the parties to the present proceeding are in agreement that exclusive jurisdiction over that land was not acquired by the United States Government because the land was not "purchased" as provided by Section 8 of the Constitution; and therefore the petitioner Cohen who resided in that area would be entitled to register as an elector residing in Solano County. This statement by the Supreme Court disposed of the petition filed by the petitioner Cohen. The other petitioners lived in various different places and different federal housing projects, all of which were on federally-owned property, and which were financed either by

the Lanham Act or other federal statutes. The State Supreme Court, discussing the matter, pointed out some of the general principles of law relative to the authority of the government and the cession of jurisdiction and acceptance thereof, and that there had been no express application for or consent to the exercise of exclusive jurisdiction by the United States Government in this case. The court considered the term "other needful buildings" and cited numerous cases, and pointed out that the term has been held to include lots and dams, post offices, customs houses, Indian training schools, homes for disabled volunteer soldiers, and war chemical manufacturing plants, but that in each of these cases as distinguished from the present proceeding, *the property was acquired for use by the United States Government in the performance of a governmental function*, and exclusive jurisdiction was consented to or ceded by the state and was exercised by the United States. Land acquired by the United States which is not subject to the exclusive legislative authority vested by the Constitution, remains subject to the jurisdiction of the state in matters not inconsistent with the free and effective use of the land for the purposes for which it was acquired. The court concluded that all of the petitioners were entitled to all of the rights of citizens.

The Legislature of the State of New York ceded to the United States jurisdiction over certain lands in and adjoining the City of Brooklyn "belonging to the United States and used and occupied as a navy yard and local hospital * * * for the uses and purposes of a navy yard and naval hospital," and provided that "the United States may retain such use and jurisdiction as long as the premises described shall be used for the purposes for which jurisdiction is ceded and no longer." The United States

leased a certain parcel of this area to the City of Brooklyn "to be used only as a stand for the market wagons to bring produce into the city." The court held that the land in question was clearly not used by the United States and occupied by it for a navy yard or naval hospital and that the exclusive authority of the United States over the land covered by the lease was at least suspended while the lease remained in force.

Palmer v. Barrett, 162 U. S. 399, 404, 16 S. Ct. 837, 40 L. Ed. 1015.

The State of Virginia ceded certain lands at Old Point Comfort to the United States with exclusive jurisdiction over the same "for the purpose of fortification and other objects of national defense." Under authority subsequently granted by the general assembly, a portion of the area was leased by the United States to private interests for the construction and operation of a hotel. In *Crook, Horner & Co. v. Old Point Comfort Hotel Company*, 54 Fed. 604, there was involved the application of certain of the state lien laws. The United States District Court held that the state lien laws were applicable within the hotel site because the property had been leased for hotel purposes jurisdiction had re-vested in the State of Virginia. The court observed:

"It is evident that this act contemplated the use of land simply for a fort, that its use for any other purpose would cause a reverter both of title and jurisdiction."

In *Arlington Hotel Company v. Fant*, 278 U. S. 439, 49 S. Ct. 227, 73 L. Ed. 447, there was involved the operation by private interests of a hotel on government-owned land. The Supreme Court held that the land was within

the jurisdiction of the United States. In that case the State of Arkansas ceded to the United States the exclusive jurisdiction over the Hot Springs Military Reservation which embraced a small hospital site and a contiguous parcel on which a hotel was being operated under a lease from the United States. The court held that this hospital and hotel site were within the jurisdiction of the United States because of the federal purpose to which the springs and hospital were devoted and that they properly included the hotel which was operated for the convenience of persons seeking the benefit of the springs, and offered means whereby the public might be aided by surplus water not needed by the hospital. However, it will be observed that the court considered this use a public use and not a private use.

The necessity of the public purpose was pointed out in the case of *Fort Leavenworth Railroad v. Lowe* (*supra*), 114 U. S. 525, 542, 5 S. Ct. 995, 29 L. Ed. 264, where it was stated that the jurisdiction granted by a state is necessarily temporary, to be exercised only so long as the places continue to be used for the public purposes for which the property was acquired or reserved from sale. When they cease to be thus used, the jurisdiction reverts to the state.

In *LaDuke v. Melin*, 45 N. D. 349, 177 N. W. 673, it was likewise held that the jurisdiction over a military reservation reverted to the State when the Government abolished the reservation.

In *Utah & Northern Railway Co. v. Fisher*, 116 U. S. 28, 29 L. Ed. 542, it was contended by the Railway Company that it was not liable for taxes on that portion of its railroad in an Indian Reservation by reason of the fact that such land and its railroad was within the exterior

boundaries of the Reservation. The Court held that the territorial government had jurisdiction.

It has been pointed out hereinabove that the United States cannot, under existing laws, acquire any part of the states' jurisdiction over lands within the states' borders unless title to the land has vested in the United States. It follows in such cases that, when the United States has divested itself of title, it relinquishes the jurisdiction acquired from the state. Jurisdiction acquired from a state by the United States will re-vest in the state when the United States ceases to use the land for any of the purposes for which its acquisition was authorized. Such reverter of jurisdiction may result from the (a) express condition of the grant by the state or (b) by operation of law.

The Congress of the United States, in adopting numerous laws relative to the jurisdiction of National Parks has definitely and consistently recognized the principle that the United States does not acquire jurisdiction unless it owns the land in question. For example, with reference to Yosemite National Park, the Secretary of Interior was authorized to acquire privately-owned land. The Statute provides that when title to the aforesaid privately-owned land has been vested in the United States, all of the land described shall be added to and become part of Yosemite National Park and "shall be subject to all laws and regulations applicable thereto." (16 U. S. C. A. 47(e).) Pursuant to 16 U. S. C. A. 51, the Secretaries of the Departments of Interior and Agriculture, for the purpose of eliminating private holdings within Yosemite National Park, may exchange other lands therefor. It is further provided that when such patented lands are thus acquired, such lands shall become part of Yosemite National Park

subject to all provisions relating thereto. By 16 U. S. C. A., Sec. 45(a), the Secretary of Interior is authorized to accept title to lands and interest in land near the entrance to Sequoia National Park. Upon acceptance of title, the land shall thereafter be subject to all laws and regulations applicable to the park. There are innumerable other statutes of similar nature relative to National Parks and jurisdiction of the United States. Without discussing these individually, they will be referred to. These sections include: 16 U. S. C. A., 161(e) (Glacier National Park); 16 U. S. C. A., 167(a) (Glacier National Park); 16 U. S. C. A., 192(b) (Rocky Mountain National Park); 16 U. S. C. A., 243 (Roosevelt Recreational Demonstration area Project); 16 U. S. C. A., 251(a) (Olympic National Park); 16 U. S. C. A., 261 (Cumberland Gap-Cumberland Ford); 16 U. S. C. A., 343(b) (Acadia National Park); 16 U. S. C. A., 403(c) (Subdivision h) (Shenandoah Park); 16 U. S. C. A., 404c-11 (Mammoth Cave National Park); 16 U. S. C. A., 424b (Chickamauga and Chattanooga National Military Park); 16 U. S. C. A., 403h-11 (Great Smoky Mountains National Park).

We recognize that neither the government nor the state will be bound by an expression of views of an individual officer or an employee thereof, no matter how carefully considered those views are, unless, of course, the individual occupies one of those few and rare positions of high authority. Furthermore, the fact that such views are pertinent to an agency and published at government expense by such agency would not bind either the state or the government. The writer has examined many articles upon the subject embraced in this brief, but the most comprehensive and helpful that has been found is one published by the government printing office by the United

States Navy in 1944 by Peter S. Twitty, and entitled, "The Respective Powers of the Federal and Local Governments Within Lands Owned or Occupied by the United States." The views expressed, particularly on pages 29 to 34 thereof, are contrary to the position of the government.

The facts show that entry was made upon the particular property more than 60 years ago, and that approximately 60 years ago, the United States Government issued a patent for the particular land in question. All of the land within an area near General Grant Grove was withdrawn from entry and was set aside as reserved forest land. Some time during the next decade, General Grant National Park was established. Out of the original 160 acres, approximately 120 acres has been subdivided and is owned by 243 persons and has been in private ownership ever since the original patent. This property is located in the County of Tulare. There has been established pursuant to the laws of the State of California a Fire District. The State Division of Forestry and the Fire District maintains fire fighting equipment at Wilsonia. Furthermore, elementary schools have been established and maintained for the residents of Wilsonia Village, one such school having been conducted until a few years ago, when the enrollment fell below the required minimum, on National Park land at General Grant. In other words, there has been every indication, not only by the residents of Wilsonia Village and the County of Tulare but also of the United States Government that Wilsonia Village was and is a part of the State of California and subject to its laws.

It is the Government's contention that it has obtained exclusive jurisdiction of this small area of privately-owned land which has never been dedicated nor set aside for park purposes, by the mere fact that the line describing

the boundary of Kings Canyon National Park encompasses this particular private property. To state such a rule is to show how fallacious it is. By the same token, if any property is located within the boundary line as described in the State Constitution of California, then, by such fact it is within the exclusive jurisdiction of the State of California. The Government's contention that it has exclusive jurisdiction over all the territory within the exterior boundaries of Kings Canyon National Park reminds us of the legend of Dido, who purchased a piece of ground near the Phoenician colony of Utica, from the Numidian King Irbas. Dido purchased as much land as could be encompassed with a bullock's hide, and after the agreement she cut the hide into small thongs and thus enclosed a large piece of territory. On this site, she built the City of Carthage.

Conclusion.

Wilsonia Village, and particularly the lands on which "The Lodge" is located, is not "reserved or acquired for the use of the United States" and, therefore, under the provisions of Subdivision 3 of Section 7 of Title 18 of the United States Code, the United States does not have jurisdiction of any alleged offenses. This one provision of the United States criminal code and of the authorities relating thereto should conclusively dispose of this appeal, and require that this Court reverse the judgment appealed from.

Furthermore, the particular land in question in Wilsonia Village has never been dedicated and set apart for park purposes. The Government has never purported to dedicate or set apart the particular land for park pur-

poses; and, indeed, the only one who could lawfully do so would be the owners thereof. The State of California, on the other hand, has ceded jurisdiction to the Federal Government and the Federal Government has accepted that cession only of land dedicated and set apart for park purposes. Since the particular land in Section 5, Township 14, has never been dedicated and set aside for park purposes, obviously jurisdiction has never been ceded by the State of California nor accepted by the United States Government.

The legal philosophy ever since the founding of this country, has been that the United States does not and cannot acquire exclusive jurisdiction unless it actually owns the property concerned. This philosophy has been recognized consistently by all of the courts. Likewise, it has been recognized and is recognized by the Congress of the United States. It is specifically so provided in the criminal code of the United States. Two of the essentials to exclusive jurisdiction by the United States are: (1) ownership, and (2) use. The express provisions of the United States Criminal Code recognize this fundamental rule.

Finally, this case involves whether or not a person shall exercise the privilege granted to him by a license issued by the State of California pursuant to the Constitution of the State of California to sell liquor. There is no contention that the appellants Petersen, *et al.*, are violating any State law whatever nor that they are conducting their business in an improper manner nor that they are endangering the National Park by the sale of liquor or the operation of such business. The contention simply is that the appellants Petersen, *et al.*, should secure a permit not

from the State Board of Equalization but from the National Park Service. Obviously, therefore, any claim of "necessity" is not well founded. Indeed, it is strange that after 60 years, the view now develops by some that exclusive jurisdiction in Wilsonia Village is necessary to secure the benefits of the National Park.

The appellants respectfully request that the judgment appealed from be reversed.

Respectfully submitted,

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No. 12694

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HARRY THEODORE PETERSEN, IDA PETERSEN, CLAYTON
LEON DAIGLE and AZILE CAROL DAIGLE, Individually
and as a Copartnership Doing Business as "The Lodge,"
and STATE OF CALIFORNIA,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S REPLY BRIEF.

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No. 12694

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HARRY THEODORE PETERSEN, IDA PETERSEN, CLAYTON
LEON DAIGLE and AZILE CAROL DAIGLE, Individually
and as a Copartnership Doing Business as "The Lodge,"
and STATE OF CALIFORNIA,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S REPLY BRIEF.

Statement of the Case.

This is an action wherein the appellee, The United States of America, brought a suit for injunction and for declaratory relief against the individual defendants, Petersen and Daigle, to determine whether the United States of America, acting through the National Park Service, or the California State Board of Equalization, had the jurisdiction to regulate the sale of liquor at Wilsonia in Kings Canyon National Park. As will be explained in more detail later in this brief, Wilsonia is a residential mountain community situated on a tract of privately owned land within the exterior boundaries of Kings Canyon National Park.

As the main problem involved here arose from a conflict of claims to jurisdiction on the part of the State

of California and of the United States, the parties to this action stipulated that the State of California might intervene in this proceeding to assure the presentation, and preservation, of the main issue, *i. e.* whether the State or the Federal Government had exclusive jurisdiction over the land involved. The State of California intervened and filed its answer in the lower court.

The facts of this case are covered in their entirety by an extensive Stipulation of Facts later adopted in the Findings of Fact of the Court below.

After the filing of exhaustive briefs upon submission of the case, the Court below, by a written Memorandum of Decision [Tr. p. 46], determined that, through the various statutes ceding and accepting exclusive jurisdiction, the State of California had exercised a constitutional power to cede exclusive jurisdiction and that the United States had exercised its constitutional power to accept such a cession of jurisdiction.

The State of California has challenged this decision and has set forth certain arguments purporting to prove that there are certain unwritten limitations upon the power of the State to cede, and the Federal Government to accept, jurisdiction. The effect of these contentions is to read into the plain language of the statutes certain limitations and reservations. It is believed that the statutes are very clear, that they simply form a contract of cession of jurisdiction, and that any attempt to read implied reservations into this contract would destroy its meaning and its purpose.

History and Background of the Wilsonia Problem.

Within the exterior boundaries of Kings Canyon National Park, in the State of California, there is a tract of approximately 120 acres of privately owned land entirely surrounded by land owned by the United States of America and used for national park purposes.

This particular land was patented to a private individual prior to the turn of the last century (October 15, 1891), shortly after General Grant National Park, the predecessor of Kings Canyon National Park, had been created on October 5, 1890, and before the State of California had ceded any jurisdiction to the United States over any national park lands in California.

Subsequently, the State of California ceded exclusive jurisdiction to the United States over Yosemite, General Grant (and later Kings Canyon), and Sequoia National Parks, with certain specific reservations. The language of these acts of cession and their acceptance by the United States will be discussed in detail later in this brief.

As a result of Federal Government land policies in the early days of the west, most national parks in the western part of the United States are dotted with small tracts of land (homesteads, mining claims, etc.), which had been patented, or were subject to being patented, to private owners before the national parks were created. There are approximately 100 tracts of such privately owned land, not counting subdivisions, in the national parks situated in California alone. These 100 tracts represent much less than one per cent of the total area of these California parks.

Even today, some lands are still being patented in these national parks. In fact, some small parcels of land in the Wilsonia Tract of Kings Canyon National Park, the identical tract under discussion here, have recently been granted to private owners in order to adjust irregularities caused by erroneous private surveys of boundaries between government and private lands. (56 Stat. 310, 16 U. S. C. A. 80a.)

There are also some privately owned, state owned, county owned, and municipally owned rights-of-way within our western national parks, including rights-of-way for roads constructed under R. S. 2477, 43 U. S. C. A. 932, rights-of-way for canals, ditches, and reservoirs constructed under the Act of March 3, 1891, 43 U. S. C. A. 946-949; and other kinds of rights-of-way granted by other Acts of Congress. As a general rule, proprietary interests vested in the grantees pursuant to these Acts before the parks were created, but there are some notable exceptions, such as the Hetch Hetchy project in Yosemite National Park (38 Stat. 242), in which the rights-of-way were granted, and the proprietary interests vested, after the parks were created.

There are also state owned school lands and certain other lands owned by states or political sub-divisions of states in some of our western national parks, but when all the various kinds of tracts of land not owned by the Federal Government, including permanent rights-of-way, are added together, they still constitute less than one per cent of the area of the parks in which they are located.

The legal question here, is whether the State of California, or the United States, has jurisdiction over these small islands of privately owned, state owned, county owned, and municipally owned lands within national parks.

The answer to this question will be very far reaching, as it will directly affect the majority of the national parks in the western United States.

The manner in which the problem is posed in the instant case only partially discloses the enormity of the problem. In the present case, the individual appellants, Petersen and Daigle, operate a cocktail lounge at Wilsonia, a residential mountain home community, which is located on 120 acres of privately owned land within the General Grant Grove section of Kings Canyon National Park, an area formerly included within General Grant National Park. The California State Board of Equalization issued a liquor license to the appellants, Petersen, *et al.*, and their predecessors, over the protests of the National Park Service, Department of the Interior, which challenged the State's jurisdiction to issue the license. National Park Service regulations require a special permit issued by the Service before anyone may sell liquor on privately owned lands within a national park. Such a permit was previously denied to appellant Petersen, and his then partner Edmunds, the predecessors in title to these individual appellants. By consent of all parties, the State of California has intervened in this proceedings so as to assure a proper presentation of the problem involved for an authoritative decision.

In this *Wilsonia* case, Tulare County has no police officers or sheriff's deputies within Kings Canyon National Park, and the nearest Tulare County peace officer is located about thirty-five miles distant. On the other hand, National Park Service rangers are stationed on park land within a few hundred yards of the boundaries of the *Wilsonia* tract.

The Federal Government, in maintaining and preserving the national parks of the nation for the benefit of all the people of the United States, is faced with very difficult problems where situations similar to those at *Wilsonia* exist. At *Wilsonia*, the sale of liquor, without regulation based on the best interests of the public in enjoying national parks, tends to nullify the purposes of the creation of a national park. Those purposes are the opportunity afforded the public, particularly family groups, to enjoy the primitive natural beauty of this area and its recreational facilities under the careful guidance of the National Park Service.

Actually, the liquor problem in national parks is only one in many wherein this jurisdictional problem arises. With tiny islands of private property within the exterior boundaries of a great national park, the Federal Government alone can effectively render the necessary policing, although it would be the responsibility of the state, if the state had jurisdiction over the property.

As a practical matter, however, the great majority of the property owners at *Wilsonia* have assumed that the United States has always had jurisdiction and have never

doubted that fact until the present proceedings were instituted.

On the only two occasions of conflict over jurisdiction at Wilsonia, the United States District Court had, without reported opinion, held that the Federal Government had jurisdiction under the ceding statutes to be discussed in this appeal. (*Andy Ferguson v. Leroy McCormick*, No. C 113-M Civil (1930), and *C. J. Fortier and W. J. Lawson v. S. B. Sherman*, No. 31 Civil (1939), both in the Southern District of California.)

The importance of the problem, and its very far reaching consequences, is therefore very clearly apparent.

Again, the question is,

“Does the State of California, or the United States, have jurisdiction over privately owned land located within a national park where the state has ceded exclusive jurisdiction over the national park in general terms?”

Manner of Reply by the Appellee.

The appellants have raised three points as the basis for their appeal. These points are:

A. The Tract of Land Comprising Wilsonia Village Was Not “Dedicated and Set Apart” for Park Purposes.

B. The United States Courts Do Not Have Jurisdiction of Offenses Unless Committed Within or on “Lands Reserved or Acquired for the Use of the United States.”

C. The United States Does Not Acquire Exclusive Jurisdiction Unless It Owns the Property Involved.

It is the firm opinion of the counsel for appellee that Points "A" and "B," above, are collateral issues and do not squarely meet the real problem of cession of jurisdiction. Point "C" does bear directly on the problem, but it is believed that all three of these arguments should be met by rebuttal after the real issues have been presented and discussed.

In the Court below, the Honorable Wm. C. Mathes, the trial judge, posed four questions which went to the very essence of the problem. The extreme clarity of the Court's understanding of the problem involved was revealed by those questions. We will, therefore, open our discussion by answering those questions substantially as they were answered for the trial court.

The questions propounded below were:

I. Does the State of California purport to cede exclusive jurisdiction over private property within Kings Canyon National Park?

II. If so, what is the constitutional authority for such cession?

III. Does the United States purport to accept exclusive jurisdiction over such property?

IV. If so, what is the constitutional authority for such acceptance of jurisdiction?

Summary of Appellee's Argument.

The appellee contends that there is only one question before this Court. That question is: May a State constitutionally cede exclusive police jurisdiction over privately owned property within a state, and may the Federal Government constitutionally accept such jurisdiction?

The appellants contend that federal ownership of land is a prerequisite to the acquisition of exclusive jurisdiction by the Federal Government. This theory has no support in the law. While there are cases purporting to so hold, each of those cases, when examined carefully, is distinguishable on its facts and clearly shows that no such broad doctrine was contemplated.

The argument set forth below will show that the State of California clearly intended to cede exclusive jurisdiction to the United States, that the United States intended to accept this offer to contract, and that thereby a contractual cession of jurisdiction, as contemplated by the United States Supreme Court in *Collins v. Yosemite Park Curry Co.*, 304 U. S. 518 (1938), took place. There are no constitutional prohibitions, either state or federal, against such a cession and acceptance of jurisdiction. Instead, the actions of the State and Federal Governments, in making this contractual settlement of jurisdiction between sovereignties, was the result of an evolution of the legal concept of jurisdiction. (See "Evolution of the Problem," below.)

The arguments of the appellants are essentially directed toward collateral points not germane to the real issues here. It is believed that the contentions of appellants that certain phrases of the ceding statutes, *i. e.*, "dedi-

cated and set apart," were requirements which were not met, are without merit when the statutes are taken together. The Court below expressly so held. Similarly, there is no defect in the territorial jurisdiction granted to the Courts. The territorial jurisdiction argument of appellants is directed toward a definition of that term in the United States Criminal Code, 18 U. S. C. A., Section 7, which code deals with certain, but not all, classes of crimes and offenses. This is not a criminal case and, even if the appellants' argument had merit, it would not be properly cognizable in this proceeding. This is a civil action and jurisdiction must be adjudged on the basis of the legislative and executive expressions of the two governments. These expressions clearly show that in a desire to establish a workable police jurisdiction over the whole of the lands, both publicly and privately owned, within the boundaries of this national park, and to avoid a piecemeal or checkerboard pattern of conflicting jurisdictions, the State and the Federal Government worked out an arrangement whereby federal jurisdiction was established over a blocked-out area and the line between state and federal jurisdiction was drawn at that point. The blocked-out area included *all* lands within the park boundaries so that a simple, unified policing could take place. Any other result would lead to a ridiculous conflict of jurisdiction calling for a determination of the status of each parcel of land within the park and making a unified administration or policing impossible. As national parks benefit both the State and the Federal Government, it must be presumed that the State, as well as the United States, had an interest in seeing that the park was efficiently administered and would therefore be willing to surrender small segments of its jurisdictional realm in order to accomplish this purpose.

APPELLEE'S ARGUMENT.

A. EVOLUTION OF THE PROBLEM.

Admittedly, the appellee United States of America asked the lower Court, and now asks this Honorable Court, to go one step farther in the field of cession of jurisdiction than any Court has heretofore been asked to do, except in the cases of *United States v. Fruitt* (Unreported decision of the District Court of the Western District of Washington, No. 15828), *Ferguson v. McCormick*, and *C. J. Fortier and W. J. Lawson v. S. B. Sherman* (cited *supra*).

All reported jurisdictional cases involve situations in which there was no occasion for the present question to be raised. As we will point out below, there appears to be no prohibition against such a cession in either state or federal constitutions, in their statutes, or in the reported cases. The cases infer that such a cession is possible, and the Court below, and the court in the *Fruitt* and *Ferguson* cases, expressly held that it could be done.

In tracing the evolution of the problem, we will discuss the methods of ceding jurisdiction and the manner in which they have come into existence.

There are several means by which the United States may acquire jurisdiction over land within the states.

The first two methods arise under Article I, Section 8, Clause 17, of the Constitution of the United States which grants the power

“To exercise exclusive Legislation in all cases whatsoever, over such District (not exceeding ten miles square) as may, by cession of particular states, and the Acceptance of Congress, become the seat

of the Government of the United States, and to exercise like authority over all places purchased by the consent of the Legislature of the State in which the same shall be, for the erection of Forts, Magazines, Arsenals, dock-yards, and other needful Buildings;” * * *.

Obviously, the first refers to the District of Columbia. It permits an exercise of exclusive jurisdiction over a particular area without any requirement that the Federal Government hold title to said land, or any part thereof.

The State of Maryland ceded the County of Washington to the United States (Acts. Md. 1791, c. 45) in 1791 providing that nothing therein contained should be construed to vest in the United States any right of property or affect rights of individuals otherwise than as transferred by such individuals to the United States. The State of Virginia ceded jurisdiction over a portion of its territory under similar provisions.

U. S. v. Belt (1944), 142 F. 2d 761, 79 U. S. App. D. C. 87;

Phillips v. Payne, Dist. Col. 1876, 92 U. S. 130.

The Federal Government has continued to exercise jurisdiction over the District without title to a large portion of the area, and this right has never been seriously questioned.

The second method, in the same Article I, Section 8, Clause 17, permits the exercise of exclusive jurisdiction over lands “purchased” for certain purposes, to-wit: forts, magazines, arsenals, dockyards, and other needful buildings. At first the purposes as set forth in this clause were strictly limited to the wording of the clause. This, however, is no longer the case. In *James v. Dravo*

Contracting Co., W. Va. 1937, 302 U. S. 134, the court said at page 143:

“We construe the phrase ‘other needful buildings’ as embracing whatever structures are found to be necessary in the performance of the functions of the Federal Government.”

The court extended the language of Clause 17 to cover dams and locks. The same result was earlier reached in *U. S. v. Tucker*, D. C. Ky., 1903, 122 Fed. 518. Numerous similar decisions are of record where “needful buildings” was construed to include hospitals, post offices, Indian schools, custom houses, and so forth.

It is quite conceivable that Clause 17 could be construed, under the broad language of the United States Supreme Court in the *Dravo* case, cited above, as embracing the acquisition of certain areas within the states to be used as national parks for the benefit of all of the people of the nation. Such national parks are maintained “in the performance of functions of the Federal Government.”

Such construction is not necessary, however, as this clause is not the sole authority for the acquisition of jurisdiction. *Collins v. Yosemite Park Co.*, 304 U. S. 518 (1938), at page 529:

“The clause is not the sole authority for the acquisition of jurisdiction. There is no question about the power of the United States to exercise jurisdiction secured by cession, although this is not provided for by Clause 17. And it has been held that such a cession may be qualified. It has never been necessary, heretofore, for this court to determine whether or not the United States has the con-

stitutional right to exercise jurisdiction over territory, within the geographical limits of a State, acquired for purposes other than those specified in Clause 17. It was raised but not decided in *Arlington Hotel v. Fant*, 278 U. S. 439, 454. It was assumed without discussion in *Yellowstone Park Transportation Co. v. Gallatin*, 31 F. (2d) 644.”

In the *Collins* case, the court went on to decide the question in favor of the government acquiring jurisdiction.

That the federal power to acquire title to, or jurisdiction over, federal lands, is not dependent on constitutional grants, or the limitations of Article I, Section 8, Clause 17, of the Constitution, but flows from inherent powers of sovereignty, see also:

United States v. Curtis-Wright Export Corp.,
299 U. S. 304, 318 (1936);

Fort Leavenworth R. R. Co. v. Lowe, 114 U. S.
525 (1885).

At this point, reference should be made to the contention of the appellants that the Federal Government must have title in order to have jurisdiction. The reason for this is that there are a number of cases, including nearly all of the cases cited by the appellant, which so imply. They do not so hold, however, and are distinguishable because of the law just referred to. Some explanation is therefore essential before proceeding further.

The courts have uniformly held that when the Federal Government acquires land under Article I, Section 8,

Clause 17, of the Constitution by "purchase" and "with the consent of the State," jurisdiction is acquired, except to, the extent that the state might place limitations upon its consent. As pointed out above, "purchase" has been strictly construed and has been held not to include lands acquired by the Federal Government by gift or condemnation or to include lands owned by the Federal Government before the state was created. It was from this construction that the Supreme Court held that there were other types of acquisition available (*Fort Leavenworth R. R. Co. v. Lowe*, 114 U. S. 525, 539), and that in such cases there had to be an *express* cession of jurisdiction by the state, and that in making such a cession, the state could limit its cession in any manner not inconsistent with the beneficial governmental use sought to be made of the land by the Federal Government (*Fort Leavenworth R. R. Co. v. Lowe*, *supra*). As we will point out later, all of the cases cited by the appellant on this point are those in which there were conditions to the cession and those conditions were not met and therefore jurisdiction was not ceded, or, they were cases in which the Federal Government sought to invoke jurisdiction automatically under Article I, Section 8, Clause 17, but there was no "purchase" and for that reason the acquisition failed.

We may, therefore, conclude that jurisdiction and title need not go hand in hand but that jurisdiction may, in some cases, cover land to which the government does not hold title.

According to the United States Supreme Court, a state may contract away jurisdiction. *Collins v. Yosemite Park Co.*, 304 U. S. 518 (1938). In that case the court held (at page 528):

“The States of the Union and the National Government may make mutually satisfactory arrangements as to jurisdiction of territory within their borders and thus, in a most effective way, cooperatively adjust problems flowing from our dual system of government.”

The inherent powers of sovereignty, which permit the United States to acquire and exercise exclusive jurisdiction over federal lands within a park, should also permit the acquisition and exercise of exclusive jurisdiction by the United States over state and private lands where the state cedes exclusive jurisdiction to the lands within the exterior boundaries of a park. The cession and acceptance of jurisdiction would constitute a contractual arrangement between state and Federal Government, over the territory involved, for the specific purpose of enabling the Federal Government to maintain and operate a national park for the benefit of the American people as a whole.

The evolution of the law of cession of jurisdiction up to this point, may thus be summarized as follows:

1. The United States may acquire ownership and jurisdiction over land, by purchase, under Article I, Section 8, Clause 17, of its Constitution.

2. This is not the sole authority for such acquisition of title or jurisdiction but the same may arise under inherent powers of sovereignty. (*Collins v. Yosemite*, and other cases, *supra*.)
3. State and Federal Governments may, by contract, make mutually satisfactory arrangements as to jurisdiction over lands within a state. (*Collins v. Yosemite*, and other cases, *supra*.)

With this background, we believe that this Court will, from the discussion to follow in this brief, find the authority to support the lower court decision to carry this reasoning on to its logical conclusions:

1. That there is no constitutional, statutory or judicial prohibition against cession of jurisdiction over public or private property, when such cession is to the mutual advantage of both state and Federal Governments and their citizens.
2. That federal jurisdiction over private lands within a national park does not derogate the title of private owners, but permits a unified administration and exercise of police power over the entire park area for the benefit of the people of the state as well as those of the nation.
3. That, therefore, where a state has, by legislative enactment, ceded such jurisdiction, and the Federal Government has accepted the same, exclusive jurisdiction should be with the United States, subject to the reservations expressed in the ceding and accepting statutes.

B. THE BASIC QUESTIONS.

I.

Does the State of California Purport to Cede Exclusive Jurisdiction Over Private Property Within Kings Canyon National Park?

The Stipulation of Facts [Tr. pp. 25-43, incl.], sets forth all of the pertinent facts in this proceeding, including the ceding statutes. Briefly, the first statute ceding jurisdiction to the United States over the territory in question was California Statutes 1919, Chapter 51, Section 1, approved April 15, 1919 [Tr. pp. 28-29] which ceded exclusive jurisdiction over General Grant National Park as well as Yosemite and Sequoia National Parks. This cession was accepted by the United States in 16 U. S. C. A. 57 [Tr. pp. 29-30]. Thereafter, General Grant National Park was abolished by 16 U. S. C. A. 80a on March 4, 1940 [Tr. pp. 30-31], and the territory therein, plus certain described sections (including those wherein Wilsonia property is located), became Kings Canyon National Park. Jurisdiction over this newly described area was ceded by Section 119 of the Government Code of California, dated April 7, 1943 [Tr. pp. 31-32], and accepted by a letter dated April 21, 1945 [Tr. pp. 32-33].

The pertinent portions of both ceding statutes are identical:

“Exclusive jurisdiction . . . is hereby ceded to the United States *over and within all of the territory which is now or may hereafter be included in those several tracts of land in the State of California set aside and dedicated for park purposes by the United States . . .*” (Emphasis added.)

By 54 Stat. 41, 16 U. S. C. A. 80a [Tr. pp. 30-31], as stated above, the United States dedicated and set apart for park purposes certain tracts of land. The land described in Section 2 of that Act by section, township and range, included the whole of the tract in which Wilsonia is located.

The most recent cession of jurisdiction, that of 1943, took place three years after Kings Canyon National Park was created. The factual background, existing at the time this 1943 cession took place, clearly indicates that both the state and Federal Government were aware, at that time, of the existence of privately owned lands in Kings Canyon National Park, and aware of the fact that there was a jurisdictional question. Yet, in the face of these facts, neither party made any expression or reservation, in either the ceding statute, or the acceptance, to indicate that privately owned lands were to be treated differently from federally owned lands so far as jurisdiction was concerned. This, we believe, is conclusive evidence that the parties intended a complete cession of jurisdiction over all lands within the park. The facts that make this so apparent are that the boundaries of Kings Canyon National Park were established by 54 Stat. 41 in 1940 [Tr. pp. 30-31], and that the contents of that statute were known to the Legislature of the State of California when Government Code, Section 119, was enacted in 1943. The Federal Government had recognized the situation by reserving "validly existing rights" under Section 2 of 54 Stat. 41. Furthermore, in 1930, the case of *Ferguson v. McCormick* (*supra*) had been decided resolving, in favor of the Federal Government, a then existing dispute over jurisdiction of the Wilsonia Tract; and, in 1940, the California Attorney General had rendered an opinion,

NS-3019, asserting jurisdiction in the state over similar lands in Yosemite National Park.

Another fact deemed extremely persuasive as to intent, is the fact that no requirement of ownership accompanies the cession of jurisdiction. Yet, the same legislature of California, in the same year of 1943, in ceding exclusive jurisdiction over military reservations, had required that the Federal Government acquire title to the land involved and perform certain other formalities. (See *California Government Code, Sec. 116.*) The lack of such a requirement in the national park cessions indicates that title was apparently not considered essential. The appellants are attempting to amend the ceding statutes, by their arguments, to read that cession would be “over those lands now or hereafter to be *acquired* by the United States.” The statutes of cession *do not* so read, and there is no justification for changing the apparent clearly intended language of the California Legislature. To adopt the construction urged by appellants would constitute making a new contract between the parties. The United States Supreme Court found the presently existing contract unequivocal in *Collins v. Yosemite Park Co. (supra)*, where, at page 528, the Court said:

“Whatever the existing status of jurisdiction at the time of their enactment, the acts of cession and acceptance of 1919 and 1920 are to be taken as declarations of the agreements reached by the respective sovereignties, State and Nation, as to the future jurisdiction and rights of each *in the entire area of Yosemite National Park.*” (Emphasis added.)

If “entire area” does not include both public and private property, what does it mean? It is submitted that the

Supreme Court at that time, in effect, decided our case for us.

To construe the statutes as the defendants urge would not only make a new contract not contemplated by the parties, but, would lead to uncertainty of jurisdiction over many types of property within the boundaries of this park, and of Yosemite and Sequoia National Parks under identical statutes, such as jurisdiction over winding state and county roads, some of which, although the extent and exact location of their rights-of-way are indefinite, are still maintained by the counties; jurisdiction over claims in cases where the proprietary interest and titles are in dispute; jurisdiction over right-of-way easements for power lines and other privately owned utility lines; jurisdiction over municipal projects, power dams and other industrial plants; and jurisdiction over all lands in which proprietary interests have been initiated and acquired from the United States since the enactment of the cession act and the acceptance.

Furthermore, the general public's concept usually envisions all land within the park gates as being policed by Park Rangers and title is not considered.

With all of this background, it would appear that the silence of the state in its 1943 ceding statute is highly significant and indicates that the statute was intended to mean exactly what it said when it ceded jurisdiction "over and within all of the territory which is now or may hereafter be included in those several tracts of land . . . set aside and dedicated for park purposes . . .," especially when language of dedication had already been used. The result was merely a contractual cession of jurisdiction over the private lands within the authority of *Collins v. Yosemite Park Co.* (*supra*), which had

clarified this point in 1938, five years prior to this ceding statute.

While the state reserved certain powers and rights of taxation, suffrage, and so forth, in no instance did the state reserve any general jurisdiction. The area over which jurisdiction is ceded is defined as "all of the territory which is now or may hereafter be included in those several tracts of land in the State of California set aside and dedicated for park purposes by the United States," and makes no exception of privately owned lands. Furthermore, at no time does the state require that the United States own the land over which jurisdiction is ceded, although at the time of the enactment of both ceding statutes, the Federal Government had already defined the park boundaries and had blocked out an area which included within it certain parcels of privately owned land. Had the state wanted to limit the cession to government lands, such a reservation could easily have been made, subject, of course, to acceptance thereof by the Federal Government. In the absence of such a reservation, and in the presence of others, it would appear that the familiar doctrine of construction, "*expressio unius est exclusio alterius*" would apply and that as certain reservations were made, it would exclude the presence of any others.

Furthermore, even had an express reservation of jurisdiction been made, the state could only reserve such jurisdiction as would not interfere with the uses to be put to the ceded area by the Federal Government.

United States v. Unzeuta, 281 U. S. 138, 142, 143, 144 (1929);

Fort Leavenworth Railroad Company v. Lowe, 114 U. S. 525, 539, 541;

- Chicago Rock Island & Pacific Railway Co. v. McGlinn*, 114 U. S. 542;
Arlington Hotel Company v. Fant, 278 U. S. 439, 451;
Benson v. United States, 146 U. S. 542;
United States v. M. M. Fruitt, No. 15828, U. S. D. C. Western District of Washington (unreported);
Rainier National Park Co. v. Martin, D. C. Wash. 1938, 23 Fed. Supp. 60 (affirmed without opinion in 302 U. S. 661), wherein the Ft. Leavenworth case is cited on this point;
Johnson v. Morrill, 20 Cal. 2d 446 (126 P. 2d 873), at page 456, where the California Supreme Court held to the same effect, citing the above cases.

It would seem, then, that the state could not have expressly or impliedly reserved powers to itself which would conflict with the proper administration of the national park. A reservation of jurisdiction over privately owned land within Kings Canyon National Park would have created such a conflict. It would have deprived the National Park Service of the right to maintain law and order, to regulate sanitation, pollution of park waters, contamination of watersheds, kindling of fires near roots of trees, dead wood, mold, etc., discard of lighted cigarettes or other burning materials, firearms, explosives, traps, and seines, and deprive them of the right to control liquor sales, on private property within the park. Admittedly, liquor sales won't create the present and imminent danger to the park found in the other illustrations, but the real problem here is the question of jurisdiction, not whether Petersen and company should sell liquor. Nevertheless, the courts have specifically held

state liquor license laws inapplicable to areas over which exclusive jurisdiction has been ceded. (*Collins v. Yosemite Park Co.*, 304 U. S. 518; *In re Ladd*, 74 Fed. 31.)

It is the position of the United States, therefore, that the State of California intended to cede, and did cede, exclusive jurisdiction over all the lands, public and private, within the exterior boundaries of Kings Canyon National Park, subject to the express reservations in the ceding statute.

II.

If so, What Is the Constitutional Authority for Such Cession?

The California Constitution neither authorizes nor prohibits cessions of jurisdiction for *any* purpose. It only forbids granting away the power of taxation.

Article I, Section 8, Clause 17, of the United States Constitution clearly indicates that a state will cede jurisdiction by its consent. While that Article deals with one type of land and jurisdiction acquisition, we know that the United States may acquire title and jurisdiction outside that Article and that a state may lawfully cede jurisdiction over lands so acquired.

Standard Oil Co. v. Johnson, 10 Cal. 2d 758, 76 P. 2d 1184, 1188;

Collins v. Yosemite Park Co., 304 U. S. 518, 528;

Fort Leavenworth R. R. Co. v. Lowe, 114 U. S. 525, 527, 531, 540, 541;

Yellowstone Park Co. v. Gallatin Co., 31 F. 2d 644, 645;

Chicago, Rock Island & Pac. R. R. v. McGlinn, 114 U. S. 542, 546;

Johnson v. Morrill, 20 Cal. 2d 446, 456.

No specific constitutional authority to cede jurisdiction existed in the cases just cited. In the *Yellowstone* case, no taxing power was reserved and it was contended that the state constitutional prohibition against ceding the taxing power was violated. (The constitutional provision was similar to that of California.) The Court held that there was no violation, and in answer to the charge that a state could cede jurisdiction over all of its territory, the Ninth Circuit held, at page 645:

“Such a contingency is possible, but improbable, and the situation must be met when it arises.”

The *Yosemite* case, *supra*, recognizes the unlimited power of the state to contract away jurisdiction at page 528 in saying:

“The states of the Union and the National Government may make mutually satisfactory arrangements as to jurisdiction of territory within their borders and thus in a most effective way, cooperatively adjust problems flowing from our dual system of government.”

In *Johnson v. Morrill* (California Supreme Court), *supra*, see page 456, where the court, after speaking of the power of the state to reserve certain powers when making a cession of jurisdiction, said: “Further or exclusive authority may be ceded by the state on any terms acceptable to the United States.”

Whether a state has yielded jurisdiction to the United States is necessarily a federal question.

Mason Co. v. Tax Commission, 302 U. S. 186, 197.

Therefore, it appears that in California there is no constitutional prohibition against ceding jurisdiction. The matter is left to legislative discretion. In *Government Code, Section 116*, the legislature made title a condition of jurisdiction (military reservation purchases). In *Section 119* (Kings Canyon National Park cession) it did not. This is a clear exercise of the power of contract as set forth in the above quotation from the *Yosemite* case. The reason for the two types of cession (*Sections 119 and 116*) is clear. *Section 116* anticipates a military use that may be temporary. An accompanying section provides for recession of jurisdiction when the military use ceases. *Section 119* cedes jurisdiction over a park area where a permanent use may be presumed.

The Court's attention is directed to a lengthy discussion of a state's power to cede jurisdiction found in *Fort Leavenworth R. R. Co. v. Lowe*, 114 U. S. 525, 527, 531, 540, 541. At page 527, the court said that where land wasn't being used for military purposes, the United States was no different from a private landowner *but* the court later concluded that although the state could exercise authority over such land, the state could also cede that power to the United States. At pages 540 and 541, the court points out the peculiar relationship between these sovereigns permitting a ceding of authority. The language of this case goes farther toward stressing a similarity to private ownership than any other cases discovered and it is believed to be quite provocative of thought on this problem.

We therefore conclude that the state has the *power* to cede jurisdiction over private lands in a case such as this.

III.

Does the United States Purport to Accept Exclusive Jurisdiction Over Such Property?

Cession of jurisdiction to the United States was accepted twice, once by an Act of Congress accepting jurisdiction over General Grant National Park, 16 U. S. C. A. 57 [Tr. pp. 29-30], and the second time by a letter dated April 21, 1945 [Tr. pp. 32-33]. Both used essentially the same language.

In 16 U. S. C. A. 57 [Tr. pp. 29-30] Congress accepted jurisdiction “over the territory embraced *and included within* the Yosemite National Park, Sequoia National Park, and General Grant National Park . . .” (Emphasis added.)

The letter of April 21, 1945 [Tr. pp. 32-33] accepted jurisdiction “*over all lands now included in Kings Canyon National Park.*” (Emphasis added.)

By 54 Stat. 41, Section 2, 16 U. S. C. A. 80a [Tr. pp. 30-31], all of Section 5, Township 14 south had been made a part of Kings Canyon National Park. *Wilsonia* lies in Section 5.

The creating statutes for both General Grant and Kings Canyon National Parks had reserved “validly existing rights.” This indicated that private *property rights* were considered and respected. However, political rights, other than those of franchise, were clearly transferred by the ceding and accepting statute.

The acceptance of exclusive jurisdiction was in accord with the long established opinions expressed by the Solicitor of the Department of the Interior to the effect, that, the Federal Government had jurisdiction over private lands within the parks. The Solicitor interpreted the

ceding and accepting statutes in so holding in 54 I. D. 122 and 483 and in unreported opinions February 15, 1936 (M. 28150), July 22, 1938 (M. 28689) and June 29, 1944 (M. 33679).

Lastly, 41 Stat. 731, Section 3, 16 U. S. C. A. Section 80e, in including Kings Canyon National Park within the Southern Judicial District of California, embraced all the territory "within" the park. Section 77, dealing with Sequoia National Park reads "within the boundaries . . . of said . . . Park."

The accepting statute of 1920 and the letter of 1945 were unequivocal. They indicated a clear intent to accept all of the jurisdiction offered by the state.

IV.

If so, What Is the Constitutional Authority for Such Acceptance of Jurisdiction?

The United States Constitution, by Article I, Section 8, Clause 17, *expressly* provides for the acquisition of jurisdiction in only a limited class of cases. (See discussion under "Evolution of the Problem," *ante*.) It does not forbid acquiring jurisdiction in other ways.

The Supreme Court has repeatedly held that this constitutional provision is not the sole authority for the acquisition of jurisdiction and that jurisdiction may be acquired otherwise under the inherent powers of sovereignty. Furthermore, when so acquired, jurisdiction is a matter of contract between the state and Federal Governments.

Standard Oil Co. v. Johnson, 10 Cal. 2d 758, 76 P. 2d 1184, 1188;

Collins v. Yosemite Park Co. (especially pages 528, 529);

Fort Leavenworth R. R. Co. v. Lowe;

U. S. v. Unzeuta;

Yellowstone Park Co. v. Gallatin Co.;

Chicago, Rock Is. & Pac. R. R. v. McGlinn;

Johnson v. Morrill.

(All cited *supra*.)

Further, whereas the only express constitutional authority required “purchase” of the land in order to acquire jurisdiction, the Supreme Court in the above cases held that where land and jurisdiction were acquired under inherent powers of sovereignty, purchase was not necessary, and jurisdiction over land acquired by prior ownership, gift, or condemnation was legal.

We believe that with this much latitude under the powers of sovereignty, the courts could have gone one step further and said, had the *Wilsonia* question been presented, that jurisdiction could pass over lands adjacent to, or encompassed by, lands acquired by the United States. That is the case here—lands encompassed by federal lands and jurisdiction over the whole essential to a federal function, the administration of a national park.

As stated earlier, the *Yosemite Park* case clearly indicates a constitutional power of contract between state and Federal governments. It seems to hold that the Federal Government may then contract to accept jurisdiction in aid of any governmental purpose.

C. REPLY TO THE ARGUMENTS OF APPELLANTS.

I.

Reply to Appellants' Argument "A."

The appellants argue that the tract of land comprising Wilsonia Village was not "Dedicated and Set Apart" for park purposes.

By 54 Stat. 41, 16 U. S. C. A. 80a [Tr. pp. 30-31], the United States dedicated and set apart for park purposes certain tracts of land. The land described in Section 2 of that Act by section, township and range, included the whole of the tract in which Wilsonia is located.

While it is true that Congress cannot divest private land owners of their property rights nor deprive them of the use and benefit of the same without just compensation, Congress can include private lands, subject to valid existing rights, in an area described and set apart as a national park and make them subject to a cession of jurisdiction by the state.

District Judge Wm. C. Mathes, the Court below, expressed this view as follows [Tr. pp. 49-50]:

"Admittedly the lands owned by defendants and individual intervenors are not 'set aside and dedicated for park purposes' [see 54 Stat. 41, 43, (1940), 16 U. S. C. §§ 80, 80a]; but it is equally beyond question that 'Wilsonia Village' is, in the language of the California Legislature, 'included in those several tracts of land in the State of California set aside and dedicated for park purposes by the United States as 'Kings Canyon National Park.'"

Therefore, while there was not, in a technical sense, a dedication of the property for park purposes, there was a delineation of the property in clear terms. This delineation was made prior to the statute of cession. The California Legislature, in no uncertain terms, adopted this description of the property with full knowledge that its terms included all property within the described area and must therefore include the small spots of private property.

Section 80a of Title 16, U. S. C. A., sheds some light on the question of dedication of private property. That section reserves, withdraws from settlement, and dedicates and sets apart certain lands as a public park to be known as Kings Canyon National Park. Yet, it provides that it shall not be construed to affect or abridge any right acquired by a citizen of the United States. Query: Does this not imply that some private property may be dedicated for political purposes, but, that proprietary rights will be reserved? The provision as to previously existing rights does not prevent the reservation or dedication of the area described, but merely acknowledges private interests therein.

For an interesting discussion of the effect of change of jurisdiction on private property rights, see *Chicago, Rock Island & Pac. R. R. Co. v. McGlinn*, 114 U. S. 542 at page 546. (In that case a leasehold was the property right affected.)

The appellants in this *Wilsonia* case urge that a cession of jurisdiction over private property is actually a taking of property without due process of law. Why is this different from ceding jurisdiction over a leasehold as in the *McGlinn*, *Leavenworth*, and *Unseuta* cases (*supra*), or different from the situations existing in many national parks where private owners have millions of dollars

worth of private property located on government land subject to exclusive federal jurisdiction? The Yosemite Park and Curry Co. alone has several million dollars worth of property so situated in Yosemite National Park.

Cession of jurisdiction does not alter, or interfere with, private rights. It is only a change of sovereigns with the Federal Government acquiring the same rights to license, zone, regulate and police that the state had, and no more. Actually, the private lands in the park are similar to lands within a zoning, irrigation, school or fire district within a state. The powers of sovereignty granted such a district do not infringe on private property rights any more or any less when the Federal Government takes jurisdiction.

Federal jurisdiction does not deny the right to operate a lawful business. The state could deny a liquor license as could the National Park Service. The same rights of appeal exist in either case. Federal regulations do not forbid liquor in national parks. In fact, permits are granted on private lands at certain locations in Yosemite.

The appellee does not believe that this objection of the appellants is material to the real issues. Instead, it appears to be purely a technicality involving an immaterial and collateral point.

Under Argument "A," the appellants raise two entirely different points which we will discuss in greater detail under Argument "C." These are, beginning on page 18 of Appellants' Opening Brief, the question of the limitations, if any, of 54 Stat. 1083, 40 U. S. C. A. 255, and the point, raised on page 19, that a state cannot cede jurisdiction of private lands within its borders. Because these two points are completely unrelated to Argument "A," discussion of them will be confined to the reply to Argument "C" which follows.

II.

Reply to Appellants' Argument "B."

The appellants contend that the United States Courts do not have jurisdiction of offenses unless committed within or on "Lands Reserved or Acquired for the Use of the United States."

This objection is irrelevant on its face as the instant proceeding is a civil, and not a criminal, action, and whether a state has yielded jurisdiction to the United States is necessarily a federal question. (*Mason v. Commissioner, supra.*) This Court is not called upon to determine the applicability of a criminal statute. The State of California has ceded its jurisdiction over the property in question so far as both civil and criminal matters are concerned. Jurisdiction having passed to the United States, it is up to Congress to confer that jurisdiction upon the Courts as it sees fit. Even if we should assume that Section 7 of Title 18, U. S. C. A., does not confer criminal jurisdiction to the Courts over private property within national parks, it would not mean that the state had any jurisdiction, since such jurisdiction has already been ceded to the United States. It would only mean that a hiatus might exist until cured by Congress.

It is not conceded, however, that Section 7 denies criminal jurisdiction in a case involving lands such as Wilsonia. It will be noted that subsection 3 of Section 7 reads in part:

"3. Any lands *reserved or acquired* for the use of the United States, *and under the exclusive or concurrent jurisdiction thereof* . . ." (Emphasis added.)

Congress *reserved* and withdrew from settlement certain forest lands, including all of Section 5, in 1890, by 26 Stats., Chapter 1263, Section 3, p. 650 [Tr. p. 71]. Provision was made that the reservation was subject to valid prior existing rights. We therefore have a reservation, even though qualified as to valid prior existing rights, and a cession of exclusive jurisdiction by the state. This should meet the requirements of Section 7.

Further, and more important, Title 18 of the United States Code is not the exclusive authority for criminal jurisdiction. Many crimes are defined, and penalties established, under other titles of the code. While the new Title 18, U. S. C., repealed a number of existing criminal laws, it did not repeal any of the other criminal statutes which concern us here. It should also be noted that the definition of "Maritime and Territorial Jurisdiction" is limited by its terms to "as used in this title."

The Court is urged to read *41 Stat. 731, Chapter 218*, in its entirety, and particularly Section 3 thereof, which reads as follows:

"SEC. 3. That said Sequoia National Park and General Grant National Park shall constitute part of the United States judicial district for the southern district of California, and the district court of the United States in and for said southern district shall have jurisdiction of *all offenses committed within the boundaries* of said Sequoia National Park and General Grant National Park." (Emphasis added.)

This language seems very clear that criminal jurisdiction was conferred on the District Court to hear and determine criminal matters arising *anywhere within the boundaries* of the park. While this statute refers to General Grant National Park, it should be noted that the

creation of Kings Canyon National Park was largely a change of name and that the ceding statute of Kings Canyon National Park was in identical terms to those used for General Grant National Park.

More recently, 16 U. S. C. A. 80e gave jurisdiction to a United States Commissioner over certain offenses "within" Kings Canyon National Park. This was repealed by 28 U. S. C. A. 631 (60 Stat. 119, Ch. 202), to the extent that it made the commissioner for Sequoia National Park also the commissioner for Kings Canyon National Park.

Section 2 of 60 Stat. 119, Chapter 202, reads in part:

"The commissioner shall have jurisdiction to issue process in the name of the United States for the arrest of any person charged with a violation of any of the rules and regulations made by the Secretary of the Interior in pursuance of law for the government and protection of the park, or with the commission within the park of a petty offense against the law, and to try the person so charged, who, if found guilty, shall be subject to the punishment prescribed by section 3 of the Act of August 25, 1916 (39 Stat. 535; 16 U. S. C., sec. 3) as amended."

Furthermore, 16 U. S. C. A. 77, which defines the jurisdiction of the courts and commissioner in regard to Sequoia National Park, is Section 3 of 41 Stat. 731, Chapter 218, cited above. The result is that the District Court has jurisdiction of all offenses committed *within the boundaries* of Kings Canyon National Park.

The cases cited by the appellants on this proposition are not at all in point. Each is distinguishable on its facts and will be so distinguished, at this point, in appellee's brief on a case by case basis.

First, the case of *Pothier v. Rodman*, U. S. Marshal (App. Op. Br. p. 21). In this case there had been an express cession of jurisdiction to the United States to take place upon the fulfillment of certain conditions. The state authorized Pierce County to condemn certain lands and donate them to the United States and said that the state consented to the cession of jurisdiction over the lands "so conveyed" and provided that upon the completion of the conveyance, a sufficient description by metes and bounds and an accurate plat or map should be filed. Pothier committed a murder, on the land in question, *before* the deeds were executed and before the maps and plats were filed. The court held that jurisdiction did not take effect until the conditions of the cession were carried out, to-wit, execution of a deed and the filing of maps and plats. This was not an Article I, Section 8, Clause 17, case because there was no "purchase" (see earlier discussion on the Evolution of the Problem) and therefore an express cession was necessary. Failure to meet the conditions of the cession caused jurisdiction to fail. That is totally unlike the present case where there is no question about failing to comply with conditions of cession. The *Pothier* case does not, therefore, offer any authority to the effect that title is necessary in all cases in order for there to be jurisdiction. The government merely had not performed its contractual obligations before the crime was committed.

In *Valley County v. Thomas* (App. Op. Br. p. 23) there was no automatic cession of jurisdiction because although there was a "purchase," the land was not acquired for any of the purposes enumerated in Article I, Section 8, Clause 17, of the Constitution. As a result, the case fell within those classes of cases where express cession of jurisdiction is necessary. The state had a

general ceding statute, but, like the statute in the *Pothier* case, there was a requirement of a filing of a plat or map. The court held that the filing of the plat or map was a condition precedent to the passage of jurisdiction and that, therefore, jurisdiction did not lie in the United States where the condition had not been fulfilled. In fact, the Court, at page 360 (97 P. 2d), held that the filing of the plat or map was in effect a giving of notice to the world that jurisdiction was being accepted by the United States.

In *Adams v. United States* (App. Op. Br. p. 23) jurisdiction failed because the United States, through the proper officer, had not given notice of acceptance of jurisdiction. Title to the land was not an issue, and was not discussed. There is no analogy whatever with the present case, as it has been stipulated that jurisdiction was accepted by the United States over the General Grant Grove Section of Kings Canyon National Park in each instance of cession.

In *United States v. Tully* (App. Op. Br. p. 25) the Constitution of Montana granted jurisdiction to the United States over certain military reservations which had been created before Montana became a state. However, the crime was committed on lands used by the reservation but never made a part thereof, and therefore jurisdiction did not attach to those lands.

The case of *People v. Bondman* (App. Op. Br. p. 25) is another case where jurisdiction was attempted to be claimed automatically under Article I, Section 8, Clause 17, of the Constitution, but, as there was no purchase, that jurisdiction fell.

In *United States v. Tierney* (App. Op. Br. p. 26) again there was no express cession of jurisdiction, and,

as the land was rented and not “purchased,” no jurisdiction could be spelled out of Article I, Section 8, Clause 17, of the Constitution.

It will be seen, therefore, that all of the cases cited by the appellants in this portion of their brief are completely inapplicable for the reason that in each case there is a specific reason why jurisdiction failed. None of these reasons was based on failure to own the land, except to the extent that in the particular types of cession involved, there was an *express* requirement of passage of complete and formal title. There are no such conditions precedent in the present case.

III.

Reply to Appellants’ Argument “C.”

It is believed that this point has been fairly well developed earlier in this brief under the section entitled “Evolution of the Problem.” Because of the serious nature of the argument, however, specific rebuttal to the arguments of appellants will be made here.

The appellants contend that there is a “legal philosophy” of the relationship between the state and the National Government which requires title as a prerequisite of jurisdiction. Some of the earlier cases might have given that impression because, as pointed out earlier, it was first thought that the only means of acquiring jurisdiction was through Article I, Section 8, Clause 17, of the Constitution which required “purchase” for certain specific purposes. However, as we have shown, the law of cession of jurisdiction has gone through a process of

evolution whereby other means of acquiring jurisdiction have arisen:

See:

Ft. Leavenworth R. R. Co. v. Lowe, supra;

Collins v. Yosemite Park Co., supra;

Standard Oil Co. v. United States, supra.

A “purchase” is no longer necessary, and it is also no longer necessary that the land in question be used for any specific purposes as long as there is some beneficial use to the government.

Discussion of Cases Cited.

The cases of *Rodman v. Pothier*, *Adams v. United States*, and *People v. Bondman* (App. Op. Br. p. 30) have been discussed and distinguished under the last previous topic.

In *James v. Dravo Contracting Co.* (App. Op. Br. p. 30) appellant makes much of the fact that the United States did not have title to the beds of the rivers upon which the dams were built. This was very true. However, it was also true that the state did not, at any time, attempt to cede jurisdiction over those dams. The statute “consented” to purchase, lease, condemnation, etc., but in ceding jurisdiction there was the express restriction that jurisdiction would lie only so long as “the United States shall be the owner.” (See West Virginia statute set forth in the footnotes on pages 143 and 144 of 302 U. S.) So, again, jurisdiction did not exist because the conditions of cession were not met. And, again, this case is unlike the present case where there are no conditions precedent to the cession of jurisdiction but merely reservations of power to serve process, to tax,

and to exercise the right of franchise. The appellants are attempting to imply certain conditions precedent that simply did not exist.

Atkinson v. State Tax Commission (App. Op. Br. p. 31) is not in point, as there was no attempt to cede jurisdiction nor any attempt by the United States to assume jurisdiction.

Johnson v. Morrill (App. Op. Br. p. 32) is merely authority for the well established rule that where land is not acquired under the provisions of Article I, Section 8, Clause 17, of the Constitution, jurisdiction is not automatic, and there must be an express cession of jurisdiction.

At page 451, the court said:

“The parties to the present proceedings are in agreement that exclusive jurisdiction over that land was not acquired by the United States because the land was not ‘purchased’ as provided by Section 8 of the Constitution.”

In that case, the United States did not assume jurisdiction and the California Court said that it felt that the United States did not want jurisdiction and that jurisdiction should not be forced upon it.

In *Palmer v. Barrett* (App. Op. Br. p. 34) the cession of jurisdiction to the United States was expressly conditioned upon continued use of the land for military purposes. When the government leased some of the land for the parking of commercial produce wagons, jurisdiction failed, by failure to comply with the requirements of the conditional cession.

The other cases cited under Appellants’ Argument “C” will not be discussed here as appellant does not offer them to support his contention that title is necessary

to jurisdiction. They merely indicate that even where the intended use has ceased, jurisdiction may not revert if the lands are being put to a public use, even though by private enterprise.

Two cases were cited earlier under Argument "B" on this point (App. Op. Br. pp. 18-19). They were *In re Conner*, 37 Wis. 379, 19 Am. Rep. 765, and *United States v. Schwalby*, 29 S. W. 90. These cases are just like the others cited by the appellants in that they are Article I, Section 8, Clause 17, cases and jurisdiction failed because of failure to comply with the express requirements of that section.

Appellant contends (App. Op. Br. p. 36) that jurisdiction reverts either by express condition of the grant by the state or by operation of law. While the former is true (see *California Government Code, Sec. 113, et seq.*), the second is not. Some of the early cases indicated that there would be a recession of jurisdiction when the specific governmental use ceased, but in *Ft. Leavenworth*, *McGlinn* and *Arlington Hotel* cases, *supra*, federal jurisdiction was upheld even where the lands were leased, or permanent rights-of-way granted, to private parties, and governmental use of the land ceased.

It should be noted that, in California, *Government Code, Section 113, et seq.*, provide a special clause of recession when property is acquired for military reservations and the military use ceases. However, there is no such provision in the California statutes dealing with national parks.

To show the fallacy of the appellants' theory of recession, let us look at the following problems: (1) If the United States grants title to a tract of park land (to a private individual), does jurisdiction automatically recede to the state? Note that there have been such grants [Tr. p. 27 (56 Stat. 310)]. Even though the land might pass to private ownership, the situation would be similar to that in *United States v. Unzueta*, 281 U. S. 138 (1929) where the court said, at page 143, that it would be impractical for the state to police it "and the Federal jurisdiction may be considered to be essential to the appropriate enjoyment of the reservation for the purposes to which it was devoted." (2) If the United States leased park lands or otherwise allocated lands to other than park purposes, must a court rule on the issue of jurisdiction in each instance? We believe not. The state and Federal Government contracted to avoid such a fluctuating jurisdiction situation by providing for a unified policing of the whole area blocked out for the national park. That a patchwork type of jurisdiction was not contemplated by the parties is clear from the language of the statute. The sovereigns wisely included in their jurisdictional contract all of the territory within the boundaries of the respective parks without requiring the Federal Government to secure and hold a proprietary interest or title in every tract of land within said parks. In such matters, courts follow the actions of political departments of the government. (*Benson v. United States*, 146 U. S. 35; *Steele v. Halligan*, 224 Fed. 1011, 1015.)

Arguments as to the National Park Statutes.

These arguments begin on page 36 of the Appellants' Opening Brief and appear to contend that the statutes imply that title is necessary to jurisdiction because of the fact that in most instances they provide that when new lands are added to the parks, they thereafter become subject to all laws and regulations applicable to the park. Such an implication does not, in fact, exist. The language of the statutes is aimed at correcting conditions entirely foreign to the problem involved here.

The appellants make considerable issue of the provisions of 40 U. S. C. A. 255 (App. Op. Br. pp. 18 and 23). That section reads, in part, that the Secretary of a department is permitted to accept exclusive jurisdiction "over lands or interests therein which have been or shall hereafter be acquired by it." It should be noted that the statute refers to "*lands or interests.*" (Emphasis added.) If the appellants are correct that *title* is necessary to jurisdiction, what does "*interests*" mean? It quite obviously means some interest in land other than title. Yet nothing short of fee simple title satisfies the appellants herein. "Interests" might be a leasehold, or, as in this case, an interest in the private land insofar as police jurisdiction over the whole park is concerned. The United States as a nation has "interests" abroad but that term has never been construed to be limited to land titles. The interests are frequently political. Here, the interest is in the general welfare of the national park as a whole and as such the interest encompasses private lands within the park that could affect or interfere with

the orderly operation and policing of the park. The distinction of "lands or interests" is believed very significant.

What if appellants are correct in their argument that Section 255 requires title? If that section has the effect of wiping out the 1943 cession, the 1919 cession still remains in effect so far as Wilsonia is concerned, due to the fact that it was a part of lands comprising General Grant Park, and there is no provision for recession of the jurisdiction ceded over that Park in 1919 by *California Statutes 1919, Chapter 51, Section 1* [Tr. pp. 28-29].

Further, however, even if appellants' argument as to Section 255 should be upheld, we believe that the act of the Secretary of Interior in accepting jurisdiction was ratified by 16 U. S. C. A. 80e (60 Stat. 119, Chapter 202), whereby the United States Commissioner was given jurisdiction over certain offenses "within" Kings Canyon National Park.

Section 80e of 16 U. S. C. A., as a code section, was repealed in 1948 and the jurisdictional portion thereof is now covered by 28 U. S. C. A. 631 (60 Stat. 119, Chapter 202) which provides that "The national park commissioner for the Sequoia National Park shall also be the national park commissioner for Kings Canyon National Park." *Section 2 of 60 Stat. 119, Chapter 202*, reads in part:

"The commissioner shall have jurisdiction to issue process in the name of the United States for the arrest of any person charged with a violation of any of the rules and regulations made by the Sec-

retary of the Interior in pursuance of law for the government and protection of the park, or with the commission within the park of a petty offense against the law, and to try the person so charged, who, if found guilty, shall be subject to the punishment prescribed by section 3 of the Act of August 25, 1916 (39 Stat. 535; 16 U. S. C., sec. 3) as amended.”

We should then look to *16 U. S. C. A., Section 77*, which provides:

“Sequoia National Park shall constitute part of the United States judicial district for the southern district of California, and the district court of the United States in and for said southern district shall have jurisdiction of all offenses committed *within the boundaries* of said Sequoia National Park.” (Emphasis added.)

Sequoia and General Grant National Parks (predecessor to Kings Canyon National Park), fell under the 1919 Statute of cession [Tr. p. 28] and Kings Canyon jurisdiction was ceded under an identical statute [Tr. p. 31]. Therefore, when Congress grants jurisdiction “within the boundaries” of these parks, it seems clear that they intended exactly what they said, to-wit, everything within the boundaries. This would appear to include private property “within the boundaries.”

The appellants cite a number of statutes (App. Op. Br. pp. 36-37), from 16 U. S. C. A. 47e to 16 U. S. C. A. 403h-11, inclusive, for the proposition that the government recognizes the principle that it does not acquire jurisdiction over lands in national parks unless it owns the lands. These statutes dealing with title have no

bearing on jurisdiction in parks where jurisdiction is ceded by the state without an express requirement of title. Since lands are acquired by the United States for many purposes, it is always desirable, and sometimes necessary (when, for example, another government bureau is supplying base lands or timber to effect an exchange) to make it clear in the statutes authorizing the acquisition, that when title to the lands vests in the United States, such lands are to continue under park administration, when such is the case.

Conclusions.

We have traced, at some length, the Evolution of the Problem of Cession of Jurisdiction. The end result is that the Supreme Court of the United States now concludes (*Collins v. Yosemite Park Co., supra*) that jurisdiction is purely a matter of contract between sovereignties to make mutually satisfactory adjustments of jurisdiction within their boundaries. The only question is whether the state intended to cede jurisdiction and whether the United States intended to accept that jurisdiction. That the parties so intended in this case seems clear, from the statutes of cession and the statute and letter of acceptance, especially when considered with the background of the problem in California.

We leave the Court with this thought:—Is the Federal Government to be dependent upon the state in which the park lies to police private holdings within the park? Or, has the Federal Government taken unto itself by cession

sufficient power to provide, without dependence upon the state, for correction of all such abuses as may arise?

The objections of appellants skirt the real question and raise collateral questions which we believe have been answered.

While we believe that a holding of jurisdiction in the United States is justified under the law as cited, it admittedly calls for courageous pioneering with new law extending the previously existing precedents. The Court below, once convinced of the merit of the government's position, did not hesitate to take that step. It is respectfully submitted that that decision should be affirmed.

Respectfully submitted,

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No. 12694.

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

HARRY THEODORE PETERSEN, IDA PETERSEN, CLAYTON
LEON DAIGLE, and AZILE CAROL DAIGEL, Individually
and as a Copartnership Doing Business as "The
Lodge," and STATE OF CALIFORNIA,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' REPLY BRIEF.

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Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' REPLY BRIEF.

In this Reply Brief appellants will point out some of the fallacies of law and the misstatements of facts, and the statements not supported by the record, appearing in appellee's brief. Of necessity, the presentation in this brief does not follow the order of presentation in either of the preceding briefs, but the subject matter will be identified by appropriate headings.

I.

Statement of Question Involved.

Appellant disagrees with the appellee's statement of the question involved. The appellants are concerned with one specific lawsuit involving the interpretation of the particular acts of cession and also involving the funda-

mental jurisdiction of the federal courts to punish offenses. This lawsuit does not involve the question stated by appellee, thus, "May a state constitutionally cede exclusive police jurisdiction over privately owned property in a state, and may the federal government constitutionally accept such jurisdiction?"

This broad, all-inclusive question is not involved in the present litigation. The appellants believe that there was no attempt by the State of California to cede nor by the United States to accept jurisdiction on such a broad scale as is now suggested by the appellee. We are concerned specifically in this instance whether the District Court may enjoin, or punish for, the sale of liquor on premises located within Wilsonia Village pursuant to a license issued only by the State Board of Equalization. This Court is not asked to determine all questions involving jurisdiction of innumerable islands of privately owned property located within the exterior boundaries of the many national parks in the western states. We are concerned with one specific instance, and in that instance our concern is with the particular wording of the particular acts. This action is no different than any other action relating to the use of, or title to, real property—the particular instruments relating to the particular property must be studied and interpreted. When these particular instruments are examined it will be seen that the property in question was never "dedicated and set apart for park purposes."

The appellee's principal argument in his brief is what he calls "the evolution of the problem" and the propound-

ing and answering of four questions. These questions briefly are, Does the State of California purport to cede exclusive jurisdiction over private property within Kings Canyon National Park; if so what is the constitutional authority for such cession; does the United States purport to accept exclusive jurisdiction over such property; and if so what is the constitutional authority for such acceptance of jurisdiction. It is the position of the appellants that the broad questions on the Constitution are not involved in this proceeding in any way. By such a device the appellee seeks to divert the attention of the Court from an examination of the particular ceding instruments to a high policy plain. So far as the State of California is concerned we are not concerned in this proceeding in any way whatsoever with any problem as to whether the State of California has constitutional authority to make a cession of exclusive jurisdiction over private property in the State of California nor the federal government has constitutional authority to accept such jurisdiction. Any discussion upon these points is purely academic and is not germane to the matter before the Court. These questions were propounded by the trial court, and have been adopted by the appellee in its brief in this Court. The assumption of the trial court and the appellee seems to be that if there is constitutional authority on the one hand of the state to cede and on the other hand for the United States to accept that, *ipso facto*, the State of California has ceded and the United States has accepted jurisdiction over privately owned lands in Wilsonia Village. This case does not involve any such issues. This case involves only an examination of the explicit language of the particular ceding acts and the fundamental law of Congress relating to the criminal jurisdiction of district courts.

II.

**Statements of Alleged Fact in Appellee's Brief Not
Supported by the Record.**

This case was submitted for decision in the District Court upon a written stipulation of facts. The stipulation provided that the matters therein stated except certain paragraphs could be admitted without objection as evidence [Tr. pp. 24-26]; but that the stipulation did not prevent any party from introducing any other admissible facts. [Tr. p. 42.] No additional evidence was offered; but an objection was made, and sustained, as to paragraphs XX and XXIX. [Tr. p. 42.] There are numerous alleged statements of fact in the brief of appellee which are not supported any way by the record. The appellants hesitate to emphasize these improper and in many cases untrue facts. Many of these same matters appeared in the brief of appellee in the District Court, and the Court's attention was called then to the impropriety.

At the outset the appellee states that there are approximately 100 tracts of such privately owned land, not counting subdivisions, in the national parks situated in California, and that these tracts represent less than one percent of the total area of the California national parks. (Appellee's Brief p. 3.) In the stipulation of facts [Tr. p. 33, paragraph IX] it was agreed that there are large numbers of small parcels of privately owned lands scattered throughout Kings Canyon National Park and other national parks in California, and that these tracts are set forth on a map which was attached as Exhibit "C." How-

ever, there is nothing whatever in the record to warrant a conclusion of such a broad statement in appellee's brief. Not only do we question the propriety of such a statement, we question the accuracy thereof.

The appellee next says (p. 4) that even today some lands are being patented in these national parks. There is no foundation whatever for this statement. The appellee also states (p. 4) that there are also state owned school lands and certain other lands owned by states or political subdivisions in some of our western national parks. This statement has no foundation of any kind in the record.

The appellee states (p. 5) that the legal question is whether the State of California or the United States has jurisdiction over these small islands of privately owned, state owned, county owned, and municipally owned lands which are in national parks. This obviously is not the case. We are concerned specifically with the sale of liquor pursuant to a license issued by the Board of Equalization for premises located within Wilsonia Village. Admittedly the decision of this Court might affect other properties.

The appellee (p. 6) states that Tulare County has no police officers or sheriff's deputies within Kings Canyon National Park and that the nearest Tulare County peace officer is located about 35 miles distant, and that the National Park Service Rangers are stationed on park land within a few hundred yards of the boundaries of Wilsonia Tract. This statement is taken from paragraph XX of the stipulation. But an objection was sustained at the trial to this particular paragraph and it therefore cannot be considered for any purpose.

The fact is, and it was so stipulated, that a permit to sell liquor was requested by the appellants Petersen *et al.*, from the National Park Service and such an application was denied. This was as far as the stipulation went. The government did not stipulate as to the reason for the denial. But the appellee says in its brief (p. 6) "At Wilsonia, the sale of liquor, without regulation based on the best interests of the public in enjoying national parks, tends to nullify the purposes of the creation of a national park." This high-sounding phrase when taken with the statement of fact that a permit was denied tends to give an impression directly contrary to the fact. Furthermore, one of the basic fallacies of the appellee's position on this and other fundamental matters throughout the whole brief is that unless the regulation is by the National Park Service, it is inadequate. There is no basis for a contention that a regulation of the sale of liquor would be any better or worse when regulated by the National Park Service than by the State Board of Equalization.

The appellee states (p. 6) that as a practical matter the great majority of property owners at Wilsonia have assumed that the United States has always had jurisdiction. This statement finds no support whatever in the record. Furthermore, the appellants insist and firmly believe that this statement is entirely contrary to the facts.

The appellee states (p. 32) that permits for the sale of liquor are granted on private lands at certain locations in Yosemite. This statement is not supported in any way whatsoever by the record. We do not concede that this statement is accurate. Certainly, the statement is immaterial.

III.

The Appellee Is Asking the Court to Re-write the Statutes and Contracts of Cession.

In the conclusion of appellee's brief it states:

“While we believe that a holding of jurisdiction in the United States is *justified* under the law as cited, *it admittedly calls for courageous pioneering with new law extending the previously existing precedents*. The court below, once convinced of the merit of the government's position, did not hesitate to take that step.” (Emphasis added.)

This statement is, we believe, a frank but genteel statement requesting the court to write judicial legislation. It has been pointed out repeatedly by the appellee, particularly from the language in *Collins v. Yosemite Park Company*, 304 U. S. 518, that the offer to cede jurisdiction by the State of California and the acceptance of such cession is a matter of contract between the state and the federal government. The appellee in its brief also states (p. 11):

“Admittedly, the Appellee United States of America asked the lower Court, and now asks this Honorable Court, to go one step further in the field of cession of jurisdiction than any Court has heretofore been asked to except in” (certain unreported cases).

By these very statements in the brief, the appellee is requesting that this Court go beyond the terms of that contract, and beyond the terms of the statutes enacted by the respective legislative bodies. In other words, the Court is being asked frankly to re-write the contractual arrangements.

The appellee states that (p. 2) the State of California has challenged the decision of the District Court and has "set forth certain arguments purporting to prove that there are certain unwritten limitations upon the power of the state to cede, and the federal government to accept, jurisdiction. The effect of these contentions is to read into the plain language of the statutes certain limitations and reservations." The appellants disagree. The fact is that the appellants are asking the Court to interpret the statutes exactly as they are written. The appellants have pointed out at great length and wish to reemphasize that the only land included within the national park was land "dedicated and set apart" for park purposes. Furthermore, there was never any dedication nor setting apart of Wilsonia Village for park purposes. Indeed, the only ones who had authority to dedicate and set aside such property for park purposes were the owners thereof. This indeed has never been done. Since when under our system of jurisprudence can a sovereign dedicate and set apart land for any purpose if it does not own or have an interest in the land?

The appellee attempts to avoid meeting this issue squarely, first by claiming that after all it is a side issue, and is "purely a technicality involving an immaterial and collateral point" (p. 32). However, the words "dedicated and set apart" are repeated throughout the statutes and form the very basis upon which the cession was granted and accepted. The cession within a certain boundary related only to property which was "dedicated and set apart for park purposes." The property in Wilsonia after all never was dedicated and set apart for park purposes and therefore it is obvious from the plain reading of the statutes that this property, although entirely surrounded

by property that was dedicated and set apart for park purposes was not affected by the acts of cession.

It is interesting to note that the appellee claims that the words “dedicated and set apart for park purposes” in the acts of cession are technicalities involving an immaterial and collateral point (p. 32); but at the same time, asserts that all of the cases cited by the appellants are “those in which there were conditions to the cession and those conditions were not met and therefore jurisdiction was not ceded” . . . (p. 15). It is obvious from the plain language of the acts of cession that as to Wilsonia Village the “conditions were not met and therefore jurisdiction was not ceded.”

IV.

The United States Courts Do Not Have Jurisdiction of Offenses Unless Committed Within or on “Lands Reserved or Acquired for the Use of the United States.”

The appellants believe they have set forth explicitly and forcefully in their opening brief that under the fundamental federal law the United States Courts do not have jurisdiction of offenses unless such offenses are committed upon “lands reserved or acquired for the use of the United States.” This is, of course, the fundamental jurisdictional statute. The appellee seeks to escape the effect of this fundamental jurisdictional statute, first by contending that the lands in Wilsonia Village are reserved lands. The fallacy of this is immediately obvious. The jurisdictional

statute reads “any lands reserved or acquired *for the use of the United States* . . .” (Emphasis added.) Under no stretch of the imagination could it be said that this land was reserved “for the use of the United States.”

The appellee also claims this property was *reserved*. The statute provides otherwise. It is true that in 1890 Section 5, Township 14 was *reserved* and withdrawn from settlement; but the particular statute expressly provided that this act did not relate to bona fide entries previously made. There had been a bona fide entry on the land in question long before the act of Congress, and the patent itself was issued shortly thereafter. In other words, by the very terms of the statute this land was exempt from the provisions of such act.

The appellee likewise seeks to avoid the effect of the fundamental jurisdictional statute by referring to section 3 of 41 Stats. 731, Chap. 218, providing that Sequoia National Park and General Grant National Park shall constitute part of the United States judicial district for the southern district of California and that such courts shall have jurisdiction of “all offenses committed within the boundaries” of said parks. It is quite obvious that the District Court does not have jurisdiction of offenses unless both of two conditions are met. First, it must be within the boundaries of the park and the conditions of subdivision 3 of section 7 of Title 18 of the United States Code must be met. That is to say that the offense must have been committed upon lands reserved or acquired for the use of the United States. Unless this latter condition is met, the Court does not have jurisdiction.

Appellee seeks further to avoid this fundamental principle by stating: "This objection is irrelevant on its face as the instant proceedings is a civil, and not a criminal, action, and whether a state has yielded jurisdiction to the United States is necessarily a federal question" (p. 33). Concededly, this case is not a criminal case. However, in making a determination of the case, the Court must determine the extent of jurisdiction of the District Courts. The determination must not be an academic or theoretical determination. The time may come when an arrest may be made or attempted for an alleged offense in the particular area and then the District Court will be face to face with the real test of jurisdiction. This particular case has been converted from an action for an injunction to one for declaratory relief. The appellants are not objecting to this turn of events. But the appellants insist that in the final analysis a judgment is not of any force and effect unless it can by some legal process be enforced. Therefore, if an individual in Wilsonia Village allegedly commits an offense, such as the sale of liquor, the District Court of the United States has jurisdiction only if the offense was committed upon lands reserved or acquired for the use of the United States. This fundamental premise raised by the appellants cannot be brushed aside on the basis that this proceeding is an equitable proceeding rather than a criminal proceeding.

V.

**The State of California Is Concerned With Adequate
and Uniform Law Enforcement.**

The appellee states that in the acts of cession the state reserved certain powers and rights such as taxation and suffrage, and then claims:

“Furthermore, even had an express reservation of jurisdiction been made, the state could only reserve such jurisdiction as would not interfere with the uses to be put to the ceded area by the federal government.”

The appellee goes on to state that it would seem that the state could not expressly or impliedly reserve powers to itself which would conflict with the proper administration of the national parks (pp. 22-23). The appellee states that the National Park Service would be deprived of the right to maintain law and order and regulate sanitation, pollution of park waters, contamination of watersheds, the kindling of fires near roots of trees and any other problems. It is strange that such a problem is presented for the first time after some of the parks in California have been established for sixty years. There are state laws governing these problems and if the occasion arises the government and its properties can be adequately protected by resort to local law. Indeed, Congress has provided in most instances that the local law in effect at the time of the creation of the parks shall continue in force in such areas. In many instances there are no federal laws or regulations

of any kind concerning certain activities in national parks. Furthermore, the acts of Congress provide that if an offense is committed in a national park and there is no federal law or regulation relating to that offense, that the local law shall apply and the federal court shall enforce the provisions of the local law. We believe that the alleged fears of the government are entirely unfounded. In fact, we believe that there is no fundamental conflict between the federal government and the state government—on the contrary the appellants firmly believe that any alleged disagreement or conflict or fear or whatever else it might be called, is a theoretical fear in the minds of a few and has no relation to the true situation.

The State of California is as much concerned with the uniform and adequate enforcement of the laws as the National Park Service. This action does not, incidentally, involve the enforcement of the laws. It involves the question of whether a liquor license should be issued by the State Board of Equalization or the National Park Service. The National Park Service objected to the issuance of the liquor license by the Board of Equalization, but this objection was not on the grounds that a liquor license should not be issued either to the premises or to the individuals in question, but was purely on a question of jurisdiction. Furthermore, there is no contention that the requirements of the state law relating to the sale and dispensing of liquor are more or less than favorable from the standpoint of the National Park Service than the regulations, if any, of the Secretary of Interior.

It is peculiar that the appellee is fearful concerning enforcement of laws particularly in this case. The transcript shows that the alcoholic beverage license was issued by the State Board of Equalization on July 22, 1948, and that five days later the Regional Director of the National Park Service by letter informed the appellant Petersen that it did not recognize the jurisdiction of the State Board of Equalization, and that if he sold liquor without a permit issued by the National Park Service he would be subject to prosecution. [Tr. pp. 36, 37.] This was July 27, 1948. There is no showing whatever that any criminal prosecution was ever initiated. However, over one year later, that is on August 5, 1949, this action for an injunction was filed. [Tr. p. 10.]

Conclusion.

It has been conclusively shown that the land in question comprising Wilsonia Village, was not "reserved or acquired for the use of the United States" and therefore the District Court does not have jurisdiction of any alleged offenses committed thereon.

It is clear that the land in question has not been "dedicated and set aside for park purposes" and therefore under the terms of the ceding acts that jurisdiction was never ceded nor accepted to the lands in question. Under the American constitutional system as it has prevailed to date, the question of "necessity" of the federal government exercising jurisdiction and ousting the state of jurisdiction is not only unthinkable but also is contrary to

all of our concepts of constitutional government. This case does not call “for courageous pioneering with new law extending the previously existing precedents.” On the contrary, the Court is required to look to the ceding acts and interpret those acts the same as it would interpret any covenant or other instrument of like formality. This is not a case that by courageous pioneering a court is warranted in rewriting the ceding acts or of disregarding the specific terms thereof. The appellants respectfully request that the judgment appealed from be reversed.

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